86-386

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1986

UNITED STATES STEEL CORPORATION
and USS, INC.,
Petitioners,

-against-

WILLIAM B. PRYOR, on behalf of himself
and a Class of other Shareholders of
Common Stock of Marathon Oil Company,
similarly situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Of Counsel:
DOMINIC B. KING
General Counsel
RICHARD M. HAYS
Secretary and Assistant General Counsel
USX Corporation
600 Grant Street
Pittsburgh, Pa. 15230

ROBERT A. BICKS
Counsel of Record
JAMES J. SABELLA
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, N.Y. 10022
(212) 888-0800
Counsel for Petitioners

September 8, 1986

98 pp

QUESTIONS PRESENTED

1. Is a private right of action for damages to be implied under § 14(d)(6) of the Securities Exchange Act of 1934 as amended by the Williams Act, 15 U.S.C. § 78n(d)(6)?

2. Does that same § 14(d)(6) federalize all state law breach of contract claims based on alleged acceptance by a tender offeror of shares whose tender was not perfected in precise compliance with time limits and other terms of the offer?

PARTIES TO THE PROCEEDING

Petitioners (defendants) are United States Steel Corporation and USS, Inc., a wholly-owned subsidiary thereof.[1] Respondent (plaintiff) William B. Pryor is an individual who purports to sue on behalf of himself and a purported class of other former shareholders of common stock of Marathon Oil Company.[2]

---

[1]The statements required by this Court's Rule 28.1 are set forth in Appendix C hereto. (Appendices A, B and C are bound together with this Petition, and pages therein are cited "A_." "B_" and "C_." respectively.)

[2]There is one other defendant named in this action, Bankers Trust Company. The decision below affirmed dismissal of all of respondent's alleged claims against such defendant.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	3
B. The Opinion of the District Court	5
C. The Opinions in the Court of Appeals	6
REASONS FOR GRANTING THE WRIT	7
I. The Court of Appeals' Rationale For Implying a Private Right of Action For Damages Conflicts With This Court's Decisions and Raises an Important Question of Federal Law That Should Be Addressed By This Court	7
II. The Court of Appeals' Decision Presents an Important Question Concerning the Scope of the Federal Securities Laws Which Should Be Settled By This Court	11
A. The Court of Appeals' Application of § 14(d)(6) to the Facts Averred at Bar Bears No Relation to the Statutory Purpose	12

Page

B. The Court of Appeals' Decision Federalizes a Wide Range of Contract Disputes and Unduly Involves the Federal Courts in the Mechanics of Tender Offers 16

CONCLUSION 19

Appendices

A. Opinions of the United States Court of Appeals for the Second Circuit, dated June 25, 1986 (794 F.2d 52) A-1

B. Opinion of the United States District Court for the Southern District of New York, dated July 2, 1984 (581 F. Supp. 942) B-1

C. Statements Pursuant to Rule 28.1 . . . . . C-1

TABLE OF AUTHORITIES

CASES

	Page
Cort v. Ash, 422 U.S. 66 (1975)	7, 8
Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984)	8
Edgar v. Mite Corp., 457 U.S. 624 (1982)	9
Indiana National Bank v. Mobil Oil Corp., 578 F.2d 180 (7th Cir. 1978)	11, 14
Merrell Dow Pharmaceuticals Inc. v. Thompson, 54 U.S.L.W. 5088 (U.S. July 7, 1986)	8
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	8
Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981)	8
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977)	7, 12, 14
Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975)	12
San Francisco Real Estate Investors v. Real Estate Investment Trust of America, 692 F.2d 814 (1st Cir. 1982)	14
Schreiber v. Burlington Northern, Inc., 105 S. Ct. 2458 (1985)	14
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)	8, 16
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)	8, 9, 10

Page

University Research Association v. Coutu,
450 U.S. 754 (1981) 8, 9, 10

STATUTES AND RULES

Securities Exchange Act of 1934 § 14(d)(6),
15 U.S.C. § 78n(d)(6) ..... i, 1, 2, passim

Securities Exchange Act of 1934 § 14(e),
15 U.S.C. § 78n(e) 2, 5

Investment Advisors Act of 1940 § 206,
15 U.S.C. § 80b-6 10

28 U.S.C. § 1254(1) 2

Davis-Bacon Act § 1(a), 40 U.S.C. § 276a(a) 10

Rule 14d-6(e)(vi), 17 C.F.R. § 240.14d-6(e)(vi) 15

Rule 14d-8, 17 C.F.R. § 240.14d-8 15

Sup. Ct. R. 28.1 ii

SEC RELEASES

SEC Exchange Act Release No. 16,112,
[1979 Transfer Binder] Fed. Sec. L. Rep.
(CCH) ¶ 82,182 (Aug. 16, 1979) 14

SEC Exchange Act Release No. 16,384,
[1979-1980 Transfer Binder] Fed. Sec. L. Rep.
(CCH) ¶ 82,373 (Nov. 29, 1979) 15

LEGISLATIVE MATERIALS

113 Cong. Rec. 854 (1967) 12

113 Cong. Rec. 856 (1967) 13

113 Cong. Rec. 24664 (1967) 12

Page

Full Disclosure of Corporate Equity Ownership And In Corporate Takeover Bids: Hearing on S.510 Before the Subcomm. on Securities of the Comm. on Banking and Currency of the Senate, 90th Cong., 1st Sess. (1967) (statement of Manuel F. Cohen) 13

H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2811 13

Takeover Bids: Hearings on H.R. 14474, S.510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) (statement of Manuel F. Cohen) 13

OTHER MATERIALS

SEC Monthly Statistical Review (April 1986) 7

No. _____

In the
Supreme Court of the United States

October Term, 1986

UNITED STATES STEEL CORPORATION
and USS, INC.,
Petitioners,

-against-

WILLIAM B. PRYOR, on behalf of himself
and a Class of other Shareholders of
Common Stock of Marathon Oil Company,
similarly situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners ("USS") pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, entered June 25, 1986. A divided panel of that Court reversed a final judgment dismissing respondent's complaint, entered by the United States District Court for the Southern District of New York, and held (a) that there is an implied private right of action for damages under § 14(d)(6) of the Securities Exchange Act of 1934 as amended by the Williams Act, 15 U.S.C.

§ 78n(d)(6), and (b) that the alleged acceptance by a tender offeror of shares whose tender was not perfected in strict compliance with the time limits and other terms of the offer constitutes a violation of § 14(d)(6).

OPINIONS BELOW

The opinions of the divided panel of the Court of Appeals are reported at 794 F.2d 52 (2d Cir. 1986) and are reproduced in Appendix A (A-1 to A-23). The opinion of the District Court is reported at 591 F. Supp. 942 (S.D.N.Y. 1982) and is reproduced in Appendix B (B-1 to B-42). Citations to such opinions are to the relevant pages in the Appendices.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 14(d)(6) of the Securities Exchange Act of 1934 as amended by the Williams Act, 15 U.S.C. § 78n(d)(6), provides:

> Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall

also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

STATEMENT OF THE CASE

A. Factual Background

This action arises out of the Offer made November 19, 1981 by USS to purchase, for $125 per share, 30,000,000—or about 50% of the outstanding shares—of Marathon Oil Company ("Marathon") common stock. To take advantage of the USS Offer, Marathon shareholders were required to tender their shares by December 4, 1981 (the "Proration Date").[1] Such tender could be effected either by delivery of the shares or by transmittal of a guarantee of delivery to defendant Bankers Trust Company as designated depositary on or before the Proration Date. To perfect tender via guarantee of delivery, shares subject to guaranty had to be delivered to Bankers Trust within eight business days thereafter.

In the event more than 30,000,000 shares were tendered and not withdrawn, as proved to be the case, shares were to be purchased pro rata based on the number of shares tendered. Tendering shareholders were given until midnight on January 6, 1982—the time set for expiration of the Offer—to withdraw. Thereafter, on January 7, USS purchased 30,000,000 of the 53,880,360 Marathon shares deemed validly tendered, not withdrawn, and therefore included in the proration pool. Three business days later, $125 per share was paid each tendering shareholder for 55.6%—30 million/53.9 million—of the shares tendered.

---

[1]The offer initially set an earlier date, which was extended as a result of litigation involving another suitor for Marathon. A-5.

The Court of Appeals summarized respondent's alleged grievance as follows (A-7):

> According to the complaint, about 3 million shares that had not been tendered in compliance with the proration and delivery dates were included in the proration pool, thus reducing the proration factor from 58.8% to 55.6%. Plaintiff thus alleges that 3.2% of the shares entitled to proration should have been purchased but were not. Calculating the losses arising from U.S. Steel's failure to purchase this 3.2% of the properly tendered shares at $50 per share, Pryor alleges that the class of holders who had timely tendered lost $83 million plus interest from January 7, 1982.

The allegations of the third amended complaint permit some refinement of such characterization of the claim. The complaint alleges that "[o]n December 8, 1981, defendants announced publicly that approximately 54 million Shares had been tendered to defendants at or before the Proration Date deadline on December 4, 1981" (¶ 53). And the complaint further alleges that "[o]n January 11, 1982 defendants announced that final verification indicated that 53,880,360 shares had been accepted for proration" (¶ 58). Thus, when the dust settled, the number of shares finally accepted for proration—53.88 million—matched nearly perfectly the "approximately 54 million" which petitioners initially announced had been tendered by the Proration Date.[2] Accepting the allegations of the

[2]Out of place here would be any reliance by respondent on petitioners' "two intermediate announcements" indicating that, at particular times between the Proration Date and expiration date, tender of a lesser number of shares—"approximately 51 million"—had been "perfected . . . ." Respondent's Fourth Alternative Claim for Relief in his third amended complaint had alleged that such intermediate

(Continued on next page)

complaint as true, therefore, the question for decision is whether inclusion in the proration pool of shares timely offered, but the tender of which may not otherwise have been "perfected" in accord with each precise term of the Offer, runs afoul of § 14(d)(6).[3]

B. The Opinion of the District Court

The District Court held that such a claim comports with neither the letter nor the purpose of § 14(d)(6). As the District Court put it (B-11—B-12):

> Section 14d(6) in particular aims to provide shareholders with adequate time to make a reasoned and informed decision whether or not to tender their shares .... In the present case, plaintiff does not claim that the minimum ten day proration period was not allowed by the defendants or that the shares which he tendered within the proration period were not accepted for proration. Thus the primary purpose of Section 14d(6), as well as the letter of the law, would seem to be complied with.

Given such disposition, the District Court did not reach the issue of whether § 14(d)(6) supports an implied private right of action for damages.

(Continued)

announcements "were false and misleading statements of a material fact" (¶ 69) in violation of § 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e). However, the Final Judgment entered with consent of respondent's counsel recites that any such claim "be, and hereby is, dismissed with prejudice."

[3]In much the same fashion, the District Court understood respondent to be alleging "that U.S. Steel accepted several million shares for proration, with respect to which tender had been *attempted* but not *perfected* by the proration date ('perfection' meaning the completion of a check on the validity of each share's certificate and the matching of certificate against prior guarantees of delivery)." B-13—B-14 n.10 (emphasis in original).

C. The Opinions in the Court of Appeals

A divided panel of the Court of Appeals reversed. The majority held that by allegedly accepting shares whose tender was not perfected in strict compliance with time and other limits of the offer, petitioners ran afoul of § 14(d)(6) by granting "preferential treatment" to some shareholders at the expense of others. Though acknowledging that "[t]he legislative history of Section 14(d)(6) is silent with regard to a private right of action" (A-12), the majority went on to imply a right of action for damages under § 14(d)(6). Sweeping aside the fact that petitioners could "gain[ ] nothing from allowing late tendering shareholders into the proration pool" (A-19), and apparently construing § 14(d)(6) as imposing strict liability, the majority reinstated respondent's $83,000,000 claim.

Judge Lumbard dissented. As he reasoned (A-19) (emphasis in original):

> Plaintiff is not complaining that U.S. Steel bought additional *non-prorated* shares, but that U.S. Steel allowed late shares *to be prorated.* I believe that the distinction is important because in the former case, the tender offeror treats tendering shareholders unequally: some shareholders have their shares prorated while others get all their shares taken up. In the latter case, which is the case at bar, all tendering shareholders are treated equally: everyone's shares are prorated.

Judge Lumbard therefore concluded that respondent had failed to allege "that U.S. Steel discriminated among shareholders in a way that violated that section." A-18.

REASONS FOR GRANTING THE WRIT

"The proliferation of cash tender offers" noted by this Court in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 n.16 (1977), continues apace. In 1984-1985 filings relating to 289 tender offers were lodged with the Securities and Exchange Commission. *See* SEC Monthly Statistical Review 4 (April 1986).

Against such backdrop, the decision of the Court of Appeals should be reviewed. First, it rests on a standard for implication of private rights of action for damages that conflicts with this Court's prior decisions. Second, it decides an important question as to the scope of the federal securities laws in such a way as to federalize a wide range of contract disputes arising in tender offers heretofore relegated to state courts for disposition.

I. The Court of Appeals' Rationale For Implying a Private Right of Action For Damages Conflicts With This Court's Decisions and Raises an Important Question of Federal Law That Should Be Addressed By This Court

As the Court of Appeals noted, § 14(d)(6) and its legislative history are both silent with regard to the existence of private rights of action thereunder. A-11—A-12.[4] In *Cort v.*

---

[4]Striving to find evidence of legislative intent to provide a private right of action, respondent relied below on a few comments submitted by third parties to congressional committees. Such statements, received without comment and never acknowledged by any legislators, were specifically characterized by this Court in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 (1977), as "entitled to little weight." The Court of Appeals did not deem such statements even worthy of mention. Accordingly, the issue presented and decided below is one where the legislative history is silent as to the existence of any private rights of action.

Ash, 422 U.S. 66, 78 (1975), this Court articulated guidelines for determining whether a private cause of action exists under a statute not expressly providing for one, guidelines which, on several occasions since, this Court has interpreted and clarified. *See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson*, 54 U.S.L.W. 5088 (U.S. July 7, 1986); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). Such subsequent cases have made clear that "what must ultimately be determined is whether Congress intended to create the private remedy asserted . . . ." *Transamerica, supra*, 444 U.S. at 15-16. "The dispositive question remains whether Congress intended to create any such remedy." *Id.* at 24.

The Court of Appeals purported to follow *Cort*, but in fact misapplied its most important criterion—the presence or absence of any "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Cort, supra*, 422 U.S. at 78. It divined such an intent based solely on the twin facts that § 14(d)(6) identified its beneficiaries—shareholders of target companies—and provided them with a substantive benefit—the right to have their shares purchased on a pro rata basis. A-13. In the majority's words, "[b]oth the identification of the beneficiaries and the substantive nature of the right created suggest that Congress intended to create a private right of action under Section 14(d)(6)." *Id.*

Implication of any private right of action on such basis wars with *Transamerica* as well as *Universities*

Research Association v. Coutu, 450 U.S. 754 (1981). To support its rationale, the Court of Appeals relied upon *Transamerica's* teaching that when a statute "by its terms neither granted private rights to members of any identifiable class, nor proscribed any conduct as unlawful . . . it was evident to the Court that no private right was available." 444 U.S. at 24. But this Court has nowhere adopted the converse of that statement, which is what the Court of Appeals held.[5] In point of fact, just to the contrary, by now well settled is that the mere fact that Congress may identify a benefited class and may proscribe certain conduct does not mean that Congress also intended that class to possess private rights to enforce its benefits.

As *Universities Research Association v. Coutu*, 450 U.S. 754, 771 (1980), put it, "the fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must be also asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation." This second enquiry was ignored by the Court of Appeals, which offered no evidence of any indication, statutory or otherwise, that Congress intended to create such a right.

---

[5]In relying on the converse of the *Transamerica* rationale, the Court of Appeals fashioned a test—beneficiaries plus substantive benefit—which, when applied to the facts of Transamerica, would have resulted in precisely the opposite result that this Court reached. *See* p. 10, *infra*. Equally puzzling is the Court of Appeals' use of the word "rights" to describe the benefit shareholders are meant to receive under § 14(d)(6). The Court of Appeals provided no explanation of why the benefit shareholders receive should be deemed anything more than a protection such as legislation often gives individuals or classes. Indeed, the only time this Court has characterized § 14(d)(6), it described the statute as providing "substantive protection," not rights. *Edgar v. Mite Corp.*, 457 U.S. 624, 644 (1982).

The Court of Appeals' reasoning would have necessitated a different result in at least two of this Court's recent cases denying implied rights of action, *Universities Research Association v. Coutu, supra*, and *Transamerica, supra*. In each, the Congressional enactment could be described as both identifying a specific beneficiary class and a substantive benefit. In neither case, however, did this Court imply any private right to sue for damages.

Thus, in *Transamerica*, clients of investment advisors were benefited under § 206 of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-6, by being provided with a right to information regarding specified transactions. 444 U.S. at 17-18. Because this Court's analysis did not stop at such a characterization of the case, however, but instead looked more closely at the situation in question, no implied right of action was found.

Similarly, *Universities Research Association v. Coutu*, like the case at bar, involved a legislative enactment that specifically proscribed certain conduct in order to protect a particular class. There, § 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a(a), barred paying construction workers on federal construction projects less than locally "prevailing wages" in order to benefit construction workers. 450 U.S. at 756-59, 771. Yet in *Universities Research*, this Court refused to find a private right because both the legislation and its history were barren of intent to create any such right.

From this it follows that in articulating a new standard—beneficiaries plus substantive benefit—the Court of Appeals has adopted a test different in wording and in result from that used by this Court. Under such new standard, any time a specific group can be styled as "benefiting" in a "substantive" way from a legislative enactment,

it can claim that it has a private right of action to enforce its substantive "right." In any number of situations, such as wage standards, OSHA regulations, discrimination cases, food and drug cases, or environmental situations, the ease with which such standard could be satisfied is readily apparent. To correct the Court of Appeals' deviation from this Court's guidelines and to reaffirm the guidelines which should be applied in considering implied rights of action cases, this Court should review the Court of Appeals' decision.

II. The Court of Appeals' Decision Presents an Important Question Concerning the Scope of the Federal Securities Laws Which Should Be Settled By This Court

The language of § 14(d)(6) is silent as to whether an offeror is prohibited from purchasing late-tendered shares or shares whose tender was not precisely perfected, and no case other than that at bar has ever held that there is such prohibition. Indeed, a contrary view appears taken by the Seventh Circuit in *Indiana National Bank v. Mobil Oil Corp.*, 578 F.2d 180, 184 (7th Cir. 1978).

In holding that § 14(d)(6) proscribes acceptance of shares whose tender was not precisely perfected in each detail as specified in the Offer, the Court of Appeals has applied the statute in a way that bears no rational relation to its language or its purpose. The result is to federalize a wide range of disputes over the mechanics of tender offers heretofore litigated in the state courts and to unduly involve the federal courts in the administrative detail of tenders.

A. The Court of Appeals' Application of § 14(d)(6) to the Facts Averred at Bar Bears No Relation to the Statutory Purpose

The goal of the Williams Act is disclosure to target company shareholders of information material to their decision to tender stock for cash. To cull from *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975):

> The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.

Accord, Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 35 (1977).

Rondeau held that "the principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer . . ." (*id.* at 60); the Williams Act thus provides no roving commission for a court to right all wrongs committed in the securities area, but should be construed in light of this goal.[6]

---

[6]By way of supporting example from the legislative history of the Williams Act:

(a) Senator Williams explained:

> This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities.

113 Cong. Rec. 854 (1967).

> S. 510 is designed solely to require full and fair disclosure for the benefit of investors.

113 Cong. Rec. 24664 (1967).

(b) The chairman of the SEC similarly testified:

(Continued on next page)

Section 14(d)(6)'s particular role in this statutory scheme is to make sure that investors have sufficient time effectively to utilize the disclosure mandated by the Act. As the Chairman of the SEC explained, "[s]ometimes the offeror promises acceptance on a first-come first-served basis, which has the effect of increasing the pressure for a hasty deposit—so that those who respond do not have a chance to take advantage of later and better offers . . . ." *Takeover Bids: Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 11 (1968) (statement of Manuel F. Cohen). Senator Williams similarly emphasized that § 14(d)(6)'s purpose was to

> outlaw tender offers on a first-come, first-served basis and thus eliminat[e] pressure on shareholders to make hasty deposits.

113 Cong. Rec. 856 (1967).

And the SEC recently reiterated that the pro rata acceptance requirements of § 14(d)(6) and other similar rules are

---

(Continued)

> [T]he general approach of . . . this bill, is to provide the investor, the person who is required to make a decision [concerning a tender], an opportunity to examine and to assess the relevant facts . . . without being pressured . . . .
>
> *Full Disclosure of Corporate Equity Ownership And In Corporate Takeover Bids: Hearing on S.510 Before the Subcomm. on Securities of the Comm. on Banking and Currency of the Senate*, 90th Cong., 1st Sess. 15 (1967) (statement of Manuel F. Cohen).
>
> (c) Finally, the House Report concisely made this same point: This bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision.
>
> H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2811, 2813.

> intended to prevent an issuer from pressuring security holders, who might otherwise assume that all tendered securities will be accepted on a first come, first served basis, into making hasty, uninformed investment decisions. *The ten day proration requirements are intended to establish minimum pro rata acceptance periods and do not address the acceptance procedure employed by an offeror beyond those minimum periods.*

SEC Exchange Act Release No. 16,112, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,182, at 82,209 (Aug. 16, 1979) (emphasis added) (footnote omitted).

Reflecting this patent design, the courts have uniformly recognized that "§ 14(d)(6) was enacted merely to remove the pressures of first-come, first-purchased practices." *Indiana National Bank v. Mobil Oil Corp.*, 578 F.2d 180, 184 n.7 (7th Cir. 1978) (citing *Piper v. Chris-Craft Industries, Inc., supra*, 430 U.S. at 23). As *Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2458, 2463 (1985), recently reaffirmed, the purpose of § 14(d) is to provide investors "additional time within which to take advantage of the disclosed information."

The Second Circuit acknowledged this purpose and that such purpose is not implicated by the facts averred at bar. But, the majority reasoned, the statute has a "dual" purpose. A-9. It "requires equal treatment of holders who tender within the proration period and thus has a nondiscrimination component." *Id.* The majority held that "[t]he discretionary power to extend selectively the proration date[7] after the offer has been oversubscribed entails the

---

[7]It is plain that a *general* extension of an offer's time limits on tender and perfection of shares does not run afoul of § 14(d)(6). The law is clear that § 14(d)(6)'s 10-day waiting period is merely a "minimum," which can be extended. *San Francisco Real Estate Investors v. Real*

(Continued on next page)

power to alter the size and make-up of the proration pool, which in turn enables the offeror to favor certain holders to the detriment of others .... The cost of this discretionary, preferential treatment is, of course, borne not by the offeror but by those who have timely tendered their shares." A-10.

In his dissent, Judge Lumbard effectively answered this argument by pointing out that the "discrimination" concern of § 14(d)(6) was the fear that offerors would favor certain investors by buying all of their shares, while purchasing only a portion of shares tendered by others. But in this case, as Judge Lumbard stated, "[p]laintiff is not complaining that U.S. Steel bought additional *non-prorated* shares, but that U.S. Steel allowed late shares *to be prorated.*" A-19 (emphasis in original). At bar, Judge Lumbard concluded, there is no unlawful discrimination because "all tendering shareholders are treated equally: everyone's shares are prorated." *Id.*

In any event, wide of the mark here is the majority's concern with the "discretionary, preferential treatment" allegedly accorded certain shareholders who did not timely perfect tender of their shares. The court's real worry was for shareholders who also failed to perfect tender in a timely fashion but whose shares might have been rejected.

(Continued)

Estate Investment Trust of America, 692 F.2d 814, 815, 817 (1st Cir. 1982). *See* SEC Rules 14d-6(e)(vi), 17 C.F.R. § 240.14d-6(e)(vi), and 14d-8, 17 C.F.R. § 240.14d-8. In adopting Rule 14d-8, the SEC specifically emphasized that:

> [T]he rule will resolve any doubt among practitioners that a bidder can extend either or both of the pro rata acceptance provisions beyond the ten-day periods without being in violation of Section 14(d)(6).

SEC Exchange Act Release No. 16,384, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,373, at 82,592 (Nov. 29, 1979).

This concern is manifest from the court's statement that it need not address the legality of an offer setting a proration period of longer than ten days, because that would not "create a danger that an offeror may at its discretion select some shares for proration no matter when they were tendered." A-11. However, shareholders whose shares were rejected because not timely tendered or perfected are not members of the class, and, therefore, concern over any fancied discrimination against such holders—the concern that bothered the majority—has no place in this case. For the alleged class at bar comprises holders who complain not that their shares were excluded from the proration pool but that shares of too many other persons were included. Sustaining any such claim would stand on its ear the Williams Act's rationale of full opportunity for maximum participation by all holders.

In this light, the decision below essentially rewrites the statute, thereby conflicting directly with this Court's teaching in *Touche Ross, supra*, that "[t]he ultimate question is one of Congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law." 442 U.S. at 578. Given the importance to this and all other tender offers of the Court of Appeals' rewriting of § 14(d)(6), the decision below warrants review by this Court.

B. The Court of Appeals' Decision Federalizes a Wide Range of Contract Disputes and Unduly Involves the Federal Courts in the Mechanics of Tender Offers

The Court of Appeals held that any acceptance by a tender offeror of shares whose tender was not perfected in strict accord with the time or other limits specified in the offer gives rise to a federal cause of action. Indeed, the

majority's holding would apply to any defect of any kind in the tender of a share; tender of such share could not be perfected within the time limits set by the offer, because tender technically was not perfected at all. Under the Court of Appeals' decision, therefore, all controversies as to whether each tender of each share complies with each term of the offer could now be the subject of a federal claim.

Recognizing that determining whether tender of each share complied strictly with each term of the Offer would present administrative complexities, the Offer provided, in language typical of most tender offers, that (A-6):

> All questions as to the validity, form, eligibility (including time of receipt) and acceptance of any tender of Shares will be determined by the Purchaser, whose determination will be final and binding . . . . The Purchaser also reserves the absolute right to waive any of the conditions of the Offer or any defect or irregularity in the tender of any Shares.

Insofar as federal securities claims are concerned, the Court of Appeals explicitly invalidated this provision. A-11.

The District Court recognized the undesirable consequences which would flow from permitting shareholders to litigate in federal court the validity of each shareholder's tender. As the District Court reasoned, such a rule would

> unduly involve the federal courts in questions concerning the mechanics of a tender offer. In order to determine whether a purchaser properly accepted shares for proration, the courts would necessarily have to determine what constitutes valid tender under the terms of the tender offer, and whether all of the shares

> accepted were validly tendered by the proration deadline. Even a technical defect in tender, if waived by the purchaser, would presumably constitute a violation of § 14d(6). In short, the federal securities law would be converted into an omnibus tool for enforcing the terms of a tender offer. We do not believe that Congress intended such a result.

B-13—B-14 (footnote omitted).[8]

To settle the federal courts' role in such contract disputes, this Court should review the judgment of the Court of Appeals.

---

[8]Judge Lumbard echoed this concern in his dissent (A-20):

> I imagine that whenever a tender offeror fixes the proration date there will be shareholders who straggle in late because of the mails, excusable neglect, or other reasons. By accommodating these shareholders, the tender offeror has liberally construed the precise terms of the offer, but I see little reason why this is of federal concern.

CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ROBERT A. BICKS
JAMES J. SABELLA
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

Counsel for Petitioners

Of Counsel:
DOMINIC B. KING
General Counsel
RICHARD M. HAYS
Secretary and Assistant General Counsel
USX Corporation
600 Grant Street
Pittsburgh, Pa. 15230

September 8, 1986

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 527
August Term, 1985
(Argued: December 3, 1985)
Decided June 25, 1986

Docket No. 85-7704

WILLIAM B. PRYOR, on behalf of himself
and a Class of other Shareholders of Common Stock
of MARATHON OIL COMPANY,
similarly situated,
Plaintiff-Appellant,

v.

UNITED STATES STEEL CORP., USS, INC.,
and BANKERS TRUST COMPANY,
Defendants-Appellees.

Before: LUMBARD, CARDAMONE and WINTER,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Mary Johnson Lowe, *Judge*, dismissing plaintiff's complaint for failure to state a claim for relief. *Pryor v. United States Steel Corp.*, 591 F. Supp. 942 (S.D.N.Y. 1984). Plaintiff sued on

his own behalf and on behalf of a class of former Marathon Oil Company shareholders who tendered shares pursuant to a tender offer by appellee United States Steel Corp. Plaintiff alleged numerous violations of the Williams Act amendments to the Securities Exchange Act of 1934, and rules promulgated thereunder, as well as certain pendent state law claims.

Affirmed in part and reversed in part. Judge Lumbard concurs and dissents in a separate opinion.

DALE A. SCHREIBER, New York, New York (Lawrence C. Browne, Schwartz Klink & Schreiber, P.C., New York, New York, of counsel), *For Plaintiff-Appellant.*

ROBERT A. BICKS, New York, New York (James J. Sabella, Breed, Abbott & Morgan, New York, New York, of counsel), *for Defendants-Appellees United States Steel Corporation and USS, Inc.*

DAVID B. EIZENMAN, New York, New York (David B. Picker, Moses & Singer, New York, New York, of counsel), *for Defendant-Appellee Bankers Trust Company.*

WINTER, *Circuit Judge:*

William B. Pryor appeals from Judge Lowe's dismissal of his claims brought under the federal securities laws on his own behalf and on behalf of a class of similarly situated

former shareholders of Marathon Oil Company. *Pryor v. United States Steel Corp.*, 591 F. Supp. 942 (S.D.N.Y. 1984). This dispute arises out of a tender offer made by appellee United States Steel Corp. through its acquisition subsidiary, appellee USS Inc., as the first step in U.S. Steel's two-step acquisition of Marathon.

The Williams Act amendments to the Securities Exchange Act of 1934 and certain rules promulgated thereunder require tender offerors to purchase shares tendered within specified time periods on a pro rata basis and at a uniform price. According to the complaint, U.S. Steel included in the proration pool three million shares that were not timely tendered. Pryor alleges that the wrongful inclusion of these shares in the pool diminished the number of his timely-tendered shares that U.S. Steel purchased. Judge Lowe dismissed the portions of the complaint relevant to this appeal[1] pursuant to Fed. R. Civ. P. 12(b)(6), ruling that Section 14(d)(6) of the Williams Act, 15 U.S.C. § 78n(d)(6), did not prohibit an offeror from extending a proration deadline after the offer has been oversubscribed and the deadline has expired, and that SEC Rule 10b-13, 17 C.F.R. § 240.10b-13 did not prohibit the purchases in question. We reverse with regard to the Section 14(d)(6) claims. Because full relief is available under that Section, we need not decide the claim asserted under Rule 10b-13. We affirm the district court's dismissal of Pryor's claims against appellee Bankers Trust Company.

BACKGROUND

In late 1981 numerous corporations, including Mobil Corporation and U.S. Steel, expressed interest in acquiring

---

[1]Other claims asserted in the Third Amended Complaint are not at issue in this appeal.

Marathon and thus generated a bidding contest and litigation. On November 19, 1981, U.S. Steel offered $125 per share for 30 million Marathon common shares, 51% of Marathon's outstanding common shares. This proved to be the prevailing bid. According to the complaint, the offer, originally set to expire on December 17, 1981, initially established a "proration date" of November 28, 1981, to govern the purchase of shares should the offer be oversubscribed. The offer provided in part:

> Upon the terms and subject to the conditions of the Offer, if more than 30,000,000 Shares (or any greater number of Shares to be purchased pursuant to the Offer) shall be validly tendered on the Proration Date and not withdrawn, then Shares so tendered shall be purchased, as provided in Section 2, on a pro rata basis . . . according to the number of Shares tendered on the Proration Date by each shareholder, and Shares tendered after the Proration Date will not be purchased. If fewer than 30,000,000 Shares are tendered on the Proration Date and not withdrawn, all Shares so tendered and not withdrawn will, subject to the terms and conditions of the Offer, be purchased and any Shares validly tendered thereafter will be purchased on a first-come, first-served basis until 30,000,000 shares . . . shall have been purchased.
>
> In the event of proration, because of the difficulty of determining the precise number of Shares validly tendered, the Purchaser does not expect that it would be able to announce the final proration factor until approximately nine New York Stock Exchange . . . trading days after the Proration Date.

This proration procedure is required by Section 14(d)(6).[2] Shareholders must accept the offer by the proration date in order to qualify for the pro rata purchase but can withdraw at any time before the expiration date. 15 U.S.C. § 78n(d)(5). The original proration date, November 28, 1981, was set, also pursuant to Section 14(d)(6), for ten days after the announcement of the offer. However, extensions of the expiration date and of the proration date were necessitated by litigation involving Mobil.[3] On December 1, 1981, a first Supplement to Offer extended the proration date to December 4, 1981. The offer itself was extended, pursuant to an order of the Sixth Circuit, to January 6, 1982.[4]

The offer provided several methods by which Marathon shareholders could tender their shares. One alternative was simply to deliver the shares to Bankers Trust, U.S. Steel's chosen depositary, on or before the proration date, December 4, 1981. Other methods were provided for

---

[2]Section 14(d)(6), 15 U.S.C. § 78n(d)(6), provides:

> Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

[3]*See Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981) (securities laws action); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982) (antitrust action).

[4]*See Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 377-78.

shareholders without immediate access to their share certificates. These provisions called for notice of acceptance of the offer within the proration period but permitted delivery of a shareholder's certificates by various means within eight New York Stock Exchange trading days after the shareholder's acceptance of the offer. To fall within the proration period under these latter methods, therefore, a shareholder had to accept the tender offer by Friday, December 4 and deliver the shares by Wednesday, December 16.

To summarize, the final offer had a proration date of December 4, 1981, a delivery date of December 16, 1981, and an expiration date of January 6, 1982. Because shareholders who met both the proration and delivery deadlines might nevertheless withdraw their shares at any time on or before January 6, 1982, however, the precise number of shares eligible for pro rata purchase could not be determined before this last date.

The offer contained a provision enabling U.S. Steel to determine the validity of tenders. It stated:

> All questions as to the validity, form, eligibility (including time of receipt) and acceptance of any tender of Shares will be determined by the Purchaser, whose determination will be final and binding. The Purchaser reserves the absolute right to reject any or all tenders not in proper form or the acceptance of or payment for which may, in the opinion of the Purchaser's counsel, be unlawful. The Purchaser also reserves the absolute right to waive any of the conditions of the Offer or any defect or irregularity in the tender of any Shares. None of the Purchaser, United States Steel, the Depositary, the Information Agent, the Dealer Managers or any other person will be under

any duty to give notification of any defects or irregularities in tenders or incur any liability for failure to give any such information.

According to the complaint, the Second Supplement to Offer published December 14 stated that 51 million shares were tendered and delivered within the dates established for proration. U.S. Steel purchased 30 million shares from the tendered shares shortly after midnight on January 7, 1982. A January 8 press release stated that 54.2 million shares were in the pool selected from, while a January 11 release put the figure at 53,880,360. On January 11, three days after the actual purchase, shareholders received cash for 55.6% of the shares tendered.

According to the complaint, about 3 million shares that had not been tendered in compliance with the proration and delivery dates were included in the proration pool, thus reducing the proration factor from 58.8% to 55.6%. Plaintiff thus alleges that 3.2% of the shares entitled to proration should have been purchased but were not. Calculating the losses arising from U.S. Steel's failure to purchase this 3.2% of the properly tendered shares at $50 per share, Pryor alleges that the class of holders who had timely tendered lost $83 million plus interest from January 7, 1982.

The district court dismissed plaintiff's claim that expansion of the proration pool violated Section 14(d)(6). We affirm the dismissal of the claims against Bankers Trust but reverse the dismissal of the Section 14(d)(6) claim against U.S. Steel.

DISCUSSION

1. Section 14(d)(6)

Section 14(d)(6) requires that offers for less than an entire class of equity securities be subject to a ten-day proration period. The district court rejected Pryor's Section 14(d)(6) claim on the grounds that the statute simply creates a mandatory minimum proration period and that an offeror might, after the proration, delivery, and expiration dates, extend the proration period. In its view, U.S. Steel's offer thus complied with Section 14(d)(6) and the extension of the proration period specified in the tender offer was actionable, if at all, only in a state law breach of contract action. 591 F. Supp. 949. The district court found support for its view, that the statute merely creates a mandatory minimum proration period, in two SEC Rules. Rule 14d-8,[5] 17 C.F.R. 240.14d-8, at the time of this offer exempted from Section 14(d)(6) offers that provided for proration periods of longer than ten days. Rule 14d-6(e)(vi), 17 C.F.R. 240.14d-6(e)(vi), required offerors to disclose in their offering materials their intentions with respect to proration. Since these rules contemplated proration periods of more than ten days, the district court reasoned, Section 14(d)(6) is implicated only in situations in which an offeror fails to provide the ten-day minimum period.

We disagree. We believe that by failing to enforce the ten-day deadline required by Section 14(d)(6) and provided in the offer, U.S. Steel failed to purchase shares on a pro rata basis and thereby violated the statute. Section

---

[5]Rule 14d-8 now requires that all partial offers provide proration rights during the entire length of the offer. We express no view on the validity of this regulation.

14(d)(6) has dual purposes: (i) it ensures that shareholders have time to consider a tender offer carefully and yet share in any control premium paid; and (ii) it deprives the offeror of any discretion to select among shareholders in paying the control premium.

The Supreme Court has noted that Section 14(d)(6) "was specifically designed to reduce pressures on target shareholders to deposit their shares hastily when the take-over bidder makes its tender offer on a first-come, first-served basis." *Piper v. Chris-Craft Industries,* 430 U.S. 1, 23 (1977). Prior to Section 14(d)(6), first-come, first-served offers were often employed in two-step takeovers. Offerors placed a premium on shares amounting to a control bloc, and tender offers for less than 100% of a company's common stock were believed by Congress to confront shareholders with a difficult and time-pressured decision. Congress reasoned that shareholders might be tempted to tender without carefully weighing the offer so as to avoid missing out on a piece of the control premium. H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2811, 2812. Section 14(d)(6)'s mandatory minimum proration period thus affords shareholders a period of time in which to consider the offer and also to share in the control premium if a decision to tender is made. It is clear therefore that the ten day period is a mandatory minimum.

In addition, Section 14(d)(6) requires equal treatment of holders who tender within the proration period and thus has a non-discrimination component. Had U.S. Steel purchased a greater than pro rata share of timely-tendered shares from a particular shareholder, it would have violated Section 14(d)(6). This is evident not only in the very use of the term pro rata, but also in Section 14(d)(6)'s

requirement that "an increase in the consideration offered to security holders" automatically extends the proration period for an additional ten days. For better or for worse, Congress desired to spread any premium for control among all shareholders tendering within the proration period. This purpose cannot be achieved unless offerors are forbidden to purchase a greater than pro rata share from particular holders.

It also follows that offerors are not free to extend the proration deadline after it has expired where the effect is to diminish the numbers of shares purchased from those who tendered before the deadline. It cannot be determined whether U.S. Steel extended the proration period for the purpose of benefitting particular shareholders. However, the result of its increasing the size of the pool after expiration of the offer is the same as if it had. The discretionary power to extend selectively the proration date after the offer has been oversubscribed entails the power to alter the size and make-up of the proration pool, which in turn enables the offeror to favor certain holders to the detriment of others. Inclusion of shares that were not timely tendered obviously increases the amount purchased from late-tendering shareholders in the first step of the offer. Moreover, it allows an offeror to extend proration selectively so as to include particular shareholders the offeror may choose to favor. The cost of this discretionary, preferential treatment is, of course, borne not by the offeror but by those who have timely tendered their shares. The latter suffer from a reduced proration factor and a smaller share of the control premium.

Neither of the SEC regulations relied upon by the district court and in effect at the time of U.S. Steel's offer are inconsistent with our holding. The critical fact in the

instant case is that U.S. Steel extended the proration period after the offer had been oversubscribed within the ten days specified by the offer and required by Section 14(d)(6), and after the proration deadlines had passed. The extension thus favored some shareholders at the expense of those who had tendered within the proration period. We need not, therefore, address the very different question of whether an offeror, when making the offer, may specify a proration period of longer than ten days. An offer that provides for a proration period of more than ten days does not, in and of itself, create a danger that an offeror may at its discretion select some shares for proration no matter when they were tendered. To the extent that the provision of the offer empowering U.S. Steel to determine the validity of a tender of shares or to waive the offer's conditions relating to tender purports to allow it to do what Section 14(d)(6) forbids, it is invalid.

2. Private Right of Action Under Section 14(d)(6)

Having dismissed Pryor's Section 14(d)(6) claim for failure to state a claim, the district court did not reach the question whether there is a private right of action under that section. Since we have reinstated that part of the complaint, we must decide whether Congress intended to provide such a cause of action. We conclude that it did.

Section 14(d)(6) makes no explicit mention of private enforcement. Therefore, we must determine "whether Congress intended to create ... by implication ... a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court identified four factors to be considered in deciding whether to imply a private right of action in the face of statutory silence. The Court has since refined

that test by emphasizing indications, either explicit or implicit, of Congressional intent. One commentator has thus noted that "the Supreme Court [has] compressed the *Cort* test to a consideration solely of legislative intent," Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 Yale L. J. 1144, 1145 n.6 (1985), and we have stated, "while [the *Cort*] factors remain relevant, the central inquiry must be whether Congress intended to create a private cause of action." *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 311 (2d Cir. 1985). We view the *Cort* factors, therefore, as proxies for congressional intent.

The first *Cort* factor is whether the plaintiffs are "one of the class for whose *especial* benefit the statute was enacted." *Cort v. Ash*, 422 U.S. at 78 (quoting *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)). If so, it is likely that Congress intended that they might seek relief directly. Pryor and the class, as shareholders of a target company, are surely the primary intended beneficiaries of Section 14(d)(6), since "the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Piper v. Chris-Craft Industries*, 430 U.S. 1, 35 (1977).

The second *Cort* factor, the one on which recent decisions have placed special emphasis, is whether there is any "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Cort*, 422 U.S. at 78. The legislative history of Section 14(d)(6) is silent with regard to a private right of action. However, such silence is clearly not a *per se* bar to such a right since "[s]uch an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444

U.S. 11, 18 (1979). *See also Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). In *Touche Ross*, the Court refused to imply a private right of action against an accountant under Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), a provision that requires record-keeping by members of national exchanges. However, "[t]he statute in *Touche Ross* by its terms neither granted private rights to the members of any identifiable class, nor proscribed any conduct as unlawful . . . . In those circumstances it was evident to the Court that no private remedy was available." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 24. Section 14(d)(6), in contrast, identifies its beneficiaries and, unlike the bulk of federal securities regulation, confers a substantive right on those beneficiaries, namely, the right to have their shares purchased on a pro rata basis. Both the identification of beneficiaries and the substantive nature of the right created suggest that Congress intended to create a private right of action under Section 14(d)(6).

The third *Cort* factor is the importance of private enforcement to effectuating Congress' goal, it being reasonable to infer that Congress intended such enforcement where it is the best way to secure the right created by the legislation. In our view, a private damage action is a most efficacious means of enforcing Section 14(d)(6). When an offeror violates the proration requirement, the injury is easy to calculate, the victims are easy to locate, and the likelihood of litigation by such victims is high if a private right of action exists. Private suits for damages are thus a most efficient means of compensating the injured parties and deterring future violations. To be sure, actions by the Securities and Exchange Commission are an alternative enforcement mechanism, but that agency must establish

priorities according to its limited resources, and those priorities may well not weigh actions such as the present one highly.

The fourth and final factor under *Cort* is whether the cause of action is one "traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law[.]" *Cort v. Ash*, 422 U.S. at 78. U.S. Steel argues that this case is governed by *Santa Fe Industries v. Green*, 430 U.S. 462 (1977) (fairness of merger terms irrelevant under Section 10(b) where there is full disclosure). *Santa Fe* is wholly inapposite, however. It involved the question of whether to create federal substantive rights in the face of congressional silence. In contrast, the issue before us is whether Congress intended that certain enforcement rights attend a substantive right established by Congress. In rejecting the contention that Section 10(b) and/or SEC Rule 10b-5 created a federal law of fiduciary duties, the *Santa Fe* court stated: "Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden." *Id.* at 479. Here, however, U.S. Steel is alleged to have violated a specific substantive provision of the Williams Act by failing to purchase shares on a pro rata basis. Under these circumstances, we are not intruding unnecessarily into the province of state contract law by recognizing a federal private remedy to enforce a requirement of a federal statute.

3. Claims Against Bankers Trust

Since neither Section 14(d)(6) nor Rule 10b-13 imposes any duties on a depositary, we affirm the district court's dismissal of Pryor's claims against Bankers Trust.

* * * *

The judgment of the district court is affirmed in part and reversed in part.

United States Court of Appeals

SECOND CIRCUIT

WILLIAM B. PRYOR,
Plaintiff-Appellant,

v.

UNITED STATES STEEL, USS, INC., and BANKERS TRUST COMPANY,
Defendants-Appellees.

Docket No. 85-7704

RALPH K. WINTER, USCJ

OPINION

Pryor v. U.S. Steel Corp., 85-7704

LUMBARD, *Circuit Judge*, concurring and dissenting:

I agree that plaintiff has failed to state a cause of action against Bankers Trust, the depositary for the tendered stocks. I disagree, however, with the majority's holding that plaintiff has stated a claim against the tender offeror, U.S. Steel.

Plaintiff alleges that U.S. Steel accepted into the proration pool approximately three million Marathon shares that had not been tendered within the 10-day proration period established by § 14(d)(6) of the Williams Act, 15 U.S.C. § 78n(d)(6), and/or delivered in accordance with the terms of the offer. Plaintiff argues that because U.S. Steel was determined to purchase only a fixed total number of shares—thirty million—its acceptance of the late tendered shares necessarily resulted in watering down the percentage of shares taken from each timely tendering shareholder. Plaintiff maintains, and the majority accepts, that U.S. Steel's alleged conduct states a cause of action under § 14(d)(6) because this provision grants the right to have shares accepted only to those shareholders who tender within the 10-day proration period. I believe that the majority has misinterpreted § 14(d)(6).

§ 14(d)(6) is designed to eliminate the pressure on shareholders to respond to a tender offer immediately, out of fear that they will be shut out if the offer becomes oversubscribed. This is done by requiring the tender offeror to accept shares tendered within the first ten days of the offer and to buy a pro rata percentage of each tendering shareholder's shares if the offer does in fact become oversubscribed in that time. Shareholders are thus accorded an

opportunity to reflect on the merits of the bid without risking their chance to participate in the offer.

U.S. Steel's alleged acceptance of late-tendered shares for proration did not interfere with these goals. U.S. Steel simply allowed more shareholders to participate in the bid than would otherwise have been able to had it been strict about the 10-day deadline. There is no indication that such conduct is actionable under § 14(d)(6) and I see no good reason why it should be. Indeed, SEC Rules 14d-8 (17 C.F.R. § 240.14d-8) and 14d-6(e)(vi) (17 C.F.R. § 240.14d-6(e)(vi)) in force at the time of U.S. Steel's offer, stated that the proration deadline was left to the terms of the tender offer, so long as it met the 10-day statutory minimum. The SEC's interpretation of § 14(d)(6) suggests that enforcement of the proration deadline is a matter of contract law, not a matter cognizable under federal securities law.[1]

As the majority points out, § 14(d)(6) also has a nondiscrimination component that prohibits an offeror from treating tendering shareholders unequally. I do not believe, however, that U.S. Steel discriminated among shareholders in a way that violated that section. During the legislative debates over the Williams Act, then SEC Chairman Cohen expressed concern over using 10 days as a minimum proration period because he felt that the tender offeror would favor sophisticated investors by waiting until the eleventh day in order to buy up *all* their shares

[1]The SEC has subsequently revised Rule 14d-8 to *require* the tender offeror to extend the proration period for the entire duration of the offer. The SEC's rationale for the revised rule is that the 10-day proration period of § 14(d)(6) is too short to give target shareholders time to evaluate critically the terms of a tender offer. As the majority states, we express no view on the validity of this Rule.

rather than just a percentage. *See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 187 (1967). In response to Chairman Cohen's concerns, proponents of the 10-day rule emphasized that a tender offeror would not be permitted to accept more shares than were originally sought without first accepting all the shares tendered within the proration period. *See id.* at 245-46 (letter of Gordon L. Calvert, general counsel, Investment Bankers Association of America).

In this case, U.S. Steel has not purchased any more shares than it had originally sought. Plaintiff is not complaining that U.S. Steel bought additional *non-prorated* shares, but that U.S. Steel allowed late shares *to be prorated.* I believe that the distinction is important because in the former case, the tender offeror treats tendering shareholders unequally: some shareholders have their shares prorated while others get all their shares taken up. In the latter case, which is the case at bar, all tendering shareholders are treated equally: everyone's shares are prorated.

Moreover, in this latter case, there should be little concern that the tender offeror will favor one group of shareholders over another. Because the tender offeror is committed to accepting a fixed number of shares, it gains nothing from allowing late tendering shareholders into the proration pool. Indeed, it is usually in the tender offeror's best interest to close the proration pool as quickly as possible in a hostile takeover battle against target management or a competing tender offeror.[2]

---

[2]This explains, in part, why Congress adopted a short mandatory proration period of 10 days. When the Williams Act was first under

(Continued on next page)

One plausible explanation of why a tender offeror might wish to accept late tendered shares for proration is that it hopes to avoid complaints from and possible lawsuits brought by the late tenderers. I imagine that whenever a tender offeror fixes the proration date there will be shareholders who straggle in late because of the mails, excusable neglect, or other reasons.[3] By accommodating these shareholders, the tender offeror has liberally construed the precise terms of the offer, but I see little reason why this is of federal concern.

(Continued)

consideration, the SEC endorsed a Senate bill which would have made the proration period co-extensive with the entire length of the offer. This suggestion was rejected in favor of the 10-day proration period used by the New York Stock Exchange because if pro rata acceptance were made mandatory for the entire period of the offer, it would allow shareholders to delay their decision to tender and give target management an unfair time advantage in a takeover battle. Congress believed that the 10-day rule both provided sufficient time for shareholders to assess the merits of a tender offer and recognized the tender offeror's desire to move quickly. *See* S. Rep. No. 550, 90th Cong., 1st Sess. 4-5 (1967).

[3]Judge Lowe hypothesized that this is what happened in the U.S. Steel offer:

> The facts in this case are illustrative. The December 8th press release announced that about 54 million shares of Marathon stock had been *tendered*. The intermediate press announcements stated that approximately 51 million shares had been *perfected*. The final number of shares accepted for proration was close to the 54 million figure. One possible interpretation of these facts is that U.S. Steel accepted several miliion shares for proration, with respect to which tender had been *attempted* but not *perfected* by the proration date ("perfection" meaning the completion of a check on the validity of each share's certificate and the matching of certificate against prior guarantees of delivery). Under plaintiff's proposed construction of § 14(d)(6), defendant's acceptance of these shares would presumably constitute a violation of the securities law, solely because the tender of these shares was technically deficient.

Pryor v. United States Steel Corp., 591 F. Supp. 942, 950 n.10 (S.D.N.Y. 1984) (emphasis in original).

This is not to say that U.S. Steel is necessarily free from any liability. The Marathon shareholders who tendered on time are harmed if U.S. Steel did in fact include late-tendered shares in the proration pool because fewer of their shares were taken up. I do not believe, however, that U.S. Steel's actions violated § 14(d)(6). If anything, its actions promoted the purposes of that section by allowing more shareholders to participate in the bid and by treating all tendering shareholders equally. If timely tendering shareholders are entitled to a preference over those who tender late, the entitlement derives from the terms of the tender offer and state contract law, not from § 14(d)(6).

I would also affirm the dismissal of the plaintiff's claim under SEC Rule 10b-13, 17 C.F.R. § 240.10b-13, which prohibits a tender offeror from making any purchases otherwise than pursuant to the offer while the offer is in effect. Plaintiff contends that by including late-tendered shares in the proration pool, U.S. Steel purchased those shares "otherwise than pursuant to" the offer. I disagree.

The purpose of the Rule is to prevent a tender offeror from making "outside" purchases on different terms, especially different price terms, from those offered to shareholders who have already tendered. But, as Judge Lowe noted, plaintiff's complaint is very different. "Plaintiff is not really claiming that purchases from the late-tendering shareholders were made outside of the tender offer, but rather that the 'late-tendering shareholders were wrongfully allowed to *participate* in the offer as if they had made a valid tender.' " *Pryor v. United States Steel Corp.*, 591 F. Supp. 942, 961 (S.D.N.Y. 1984) (emphasis in original).

Because I would hold that U.S. Steel's actions did not violate § 14(d)(6) or Rule 10b-13, I would not reach the question of an implied damage remedy.

United States Court of Appeals

SECOND CIRCUIT
85-7704

WILLIAM B. PRYOR, et al.,
Plaintiff-Appellant,

-against-

U. S. STEEL CORP., et al.,
Defendants-Appellees.

CONCURRING AND DISSENTING
OPINION

LUMBARD, C. J.

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

WILLIAM B. PRYOR, *Plaintiff,* -against- U. S. STEEL CORP., et al., *Defendants.*	MEMORANDUM OPINION AND ORDER 82 Civ. 216 (MJL)

APPEARANCES:

SCHWARTZ, KLINK & SCHREIBER, P.C.
Attorneys for Plaintiff
666 Third Avenue
New York, New York 10017

BREED, ABBOTT & MORGAN
Attorneys for Defendant
United States Steel Corporation
Citicorp Center
153 East 53rd Street
New York, New York 10022

MOSES & SINGER
Attorneys for Defendant
Bankers Trust Company
Time Life Building
1271 Avenue of the Americas
New York, New York 10022

MARY JOHNSON LOWE, D. J.

This is an action brought on behalf of a class of shareholders of Marathon Oil Co. ["Marathon"],[1] under the Securities Exchange Act of 1934, and certain rules promulgated thereunder. Plaintiff seeks damages allegedly sustained during the take-over of Marathon by United States Steel Corp. ("U.S. Steel"),[2] in January, 1982, by way of a tender offer. In addition to his federal claims, plaintiff has several pendant state claims for breach of contract. This matter is now before us on defendant's motion to dismiss, brought pursuant to Rule 12b(6), Fed.R.Civ.P.

FACTUAL BACKGROUND

The following facts aer not in dispute. On November 19, 1981, defendants U.S. Steel and USS, Inc., made a tender offer to purchase 30,000,000 shares of Marathon common stock for $125.00 per share. The tender offer provided that in the event that more than 30,000,000 shares were tendered and not withdrawn, shares were to be purchased pro rata according to the number of shares tendered on or before the proration date.[3] The proration date was

---

[1]Plaintiff William Pryor brings this action "on behalf of himself and all other persons or entities similarly situated who owned, held, or were otherwise entitled to tender Common Shares of Marathon to defendants in accordance with the terms of the defendants' public Tender Offer on or before the Proration date and who duly tendered and perfected tender thereof on or before the Proration Date rather than afterwards."

[2]Defendants in this action include U.S. Steel, USS, Inc., an indirect wholly owned subsidiary of defendant U.S. Steel and Bankers Trust Company ["BTC"], a New York banking corporation.

[3]The relevant provision of the tender offer provided as follows:

> The manner in which the Purchaser [USS, Inc.] will purchase validly tendered Shares, upon the terms and subject to the conditions of the Offer, will depend upon whether the Offer is oversubscribed by Shares validly tendered at or prior to 12:00 Midnight,

(Continued on next page)

originally set as November 28, 1981, at 12:00 midnight, New York City time, thus establishing a ten day proration period. The tender offer was to expire on December 17, 1981, at 12:00 midnight, New York City time, unless extended. Subsequently, extensions of the original deadlines became necessary because of litigation brought by Mobil Corporation against defendants U.S. Steel and USS, Inc., which delayed implementation of the tender offer. Pursuant to a first Supplement to Offer, published on December 1, 1981, the proration date was extended to December 4, 1981, at 12:00 midnight, New York City time. Pursuant to an order of the Sixth Circuit Court of Appeals, dated December 23, 1981, and as set forth in a second Supplement to Offer, published on December 24, 1981, the expiration date was extended so that the tender offer would expire on January 6, 1982, at 12:00 midnight, New York City time.[4]

(Continued)

> New York City time, on Saturday, November 28, 1981 (the "Proration Date"), and not withdrawn. Upon the terms and subject to the conditions of the Offer, if more than 30,000,000 shares (or any greater number of Shares to be purchased pursuant to the Offer) shall be validly tendered on the Proration Date and not withdrawn, then Shares so tendered shall be purchased as provided in Section 2, on a pro rata basis (adjusted to avoid the purchase of fractional Shares) according to the number of shares tendered on the Proration Date by each shareholder, and Shares tendered after the Proration Date will not be purchased.

Offer to Purchase 30,000,000 Common Shares—November 19, 1981, Sec. 1, pp. 2-3.

[4]The Court of Appeals for the Sixth Circuit, by decision filed December 23, 1981, found that U.S. Steel and USS, Inc. had violated section 14(e) of the Securities Exchange Act by reason of certain unlawful "lock-up options" obtained in connection with the tender offer and the related merger agreement with Marathon. *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 374 (6th Cir. 1981, *cert. denied*, 102 S.Ct. 1490 (1982). U.S. Steel and USS, Inc. were enjoined from continuing with the tender offer unless these unlawful lock-up options were surrendered.

According to the tender offer, tender could be perfected either by delivery of the shares to BTC, or under prescribed circumstances, by transmittal of a guarantee of delivery to BTC, on or before the proration date, *and* delivery of the shares to BTC within eight business days after execution of the guarantee. This meant that the latest *possible* date by which shares would have to be delivered in order to be included in the proration pool, was December 16, 1981, at midnight.

However, since Marathon shareholders who had tendered could withdraw the shares up until the expiration date, January 6, 1982, the actual number of shares in the proration pool, and hence the proportion of each participant's tendered shares that would be bought for cash, did not become fixed until that date.

On December 8, 1981, defendants announced publicly that approximately 54 million shares had been tendered by the proration date. Following this initial announcement, two intermediate announcements were made indicating that a lesser number of shares—"approximately 51 million"—had been "perfected . . . within the required time period."[5]

---

[5]A press release issued on December 17, 1981 announced:

> Tenders of approximately 51 million shares of Marathon have been perfected under the offer by the delivery of stock certificates within the required time period.

Then in the Second Supplement Offer, published December 24, 1981, defendants stated:

> 3. Proration Date. The Proration Date of Friday, December 4, 1981 has not been changed. Tenders of approximately 51,000,000 shares have been perfected under the Offer by the delivery of stock certificates within the required time period and, if such Shares are not withdrawn, Shares tendered after the Proration Date will not be purchased.

The purchase by U.S. Steel of thirty million tendered shares took place shortly after midnight on January 7. In a press release dated January 8, 1982, U.S. Steel announced that 54,200,000 Marathon shares were held by the Depositary as of midnight January 6, 1982. Plaintiff's Exhibit G to Affidavit. Finally, in a press release dated January 11, 1982, U.S. Steel announced that "53,880,360 Marathon Co. shares have been accepted for proration." Plaintiff's Exhibit H to Affidavit.

On January 11, three business days after the purchase occurred, shareholders were paid $125 per share for 55.6% of the shares tendered.

Plaintiff alleges, and the Court must assume for the purpose of this motion, that defendants accepted for inclusion in the proration pool approximately three million shares of common stock, which had not been duly and validly tendered under the terms of the tender offer on or before the proration date of December 4, 1981. According to plaintiff, some of these shares were accepted for inclusion in the proration pool after December 16, 1981, the latest possible delivery date.

The acceptance of the late tendered shares reduced the pro rata percentage of plaintiff's shares that were purchased and paid for by defendants, from approximately 58.8% of plaintiff's tendered shares to approximately 55.6% of plaintiff's tendered shares (or a 3.2% difference). Plaintiff allegedly perfected tender on 1,500 Common Shares of Marathon prior to the proration deadline. Therefore, according to plaintiff, he was entitled to have 882 shares purchased, but defendants have accepted and paid for only 834 shares at the $125 price. Plaintiff claims that he has damaged in an amount of approximately $50 per share not accepted because of the wrongful inclusion of the

three million late tendered shares. In addition plaintiff claims, upon information and belief, that the persons and entities which constitute the class of shareholders on whose behalf this action is brought, perfected tender of approximately 51,000,000 common shares of Marathon in accordance with the terms of the tender offer prior to or on the proration deadline. Plaintiff estimates that the damages caused by the wrongful exclusion of 3.2% of the shares tendered by the class, amounted to approximately 83 million dollars together with interest from January 7, 1982.

In the alternative plaintiff alleges that if defendants did not accept shares perfected after the proration date and delivery date, they intentionally made false and misleading statements of material fact to the public (in both the December 17 press release and the December 24, Supplement to the Offer), in that defendants knew that a materially larger number of shares—approximately 54 million—were to be accepted for proration. Plaintiff further alleges that he and other members of the class reasonably relied on defendants' misrepresentations in calculating the number of shares that were to be returned to them unpurchased at the end of the waiting period, and acted on the basis of this information in their subsequent investment decisions. Knowing that the market price for the unpurchased and returned shares would be substantially lower than the case price of $125 per share being paid under the tender offer, plaintiff and other class members allegedly attempted to reduce their losses by engaging in various hedging transactions, including selling calls and/or buying puts, and engaging in option transactions and short sales. Plaintiff alleges that because of their reliance on defendants' misrepresentations, he and other class members suffered financial

injury and losses in connection with their hedging transactions and with the eventual disposition or sale of unpurchased shares.

Plaintiff makes several claims for relief. He claims first that the defendants' acceptance of late-tendered shares for proration, violated Sections 10(b), 14(d)(6), and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(d)(6) and 78n(e) and the rules promulgated thereunder including Rule 10b-13, Rule 14d-6(d), and Rule 14d-6(e), C.F.R. §§ 240.10b-13, 240.14d-6(d), 240.14d-6(e), and the common law of contracts. *See* Plaintiff's Second Amended Complaint, First, Second and Sixth Claims For Relief. He further claims that by accepting late-tendered shares, defendants effectively extended the proration date, without public notice of such extension in violation of Section 14(e) of the Securities Exchange Act of 1934, and Rule 14e-1(D), C.F.R. § 240.14E-1(d). See Plaintiff's Third Claim for Relief.

Alternatively, plaintiff claims that defendants made false and misleading statements of material fact in violation of Sections 14(d) and 14(e) of the Securities Exchange Act and Rules 14d-6(d) and Rule 14d-6(e). See Plaintiff's Fourth Claim for Relief.

Finally, plaintiff claims that defendants' failure to pay promptly for the stock tendered by plaintiff and other members of the class, violated Section 14(e) of the Securities Exchange Act of 1934, and Rule 14e-1(c) promulgated pursuant thereto, and the common law of contracts. See Plaintiff's Fifth and Seventh Claims for Relief.

Defendants have moved to dismiss all of the plaintiff's claims. For the reasons set forth below, we find that

defendants' motion should be granted in part and denied in part.

Section 14d(6) Claim

Plaintiff's first and primary claim arises under Section 14d(6) of the Williams Act, 15 U.S.C. § 78n(d)(6). Section 14d(6) provides in relevant part:

> Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor.

Plaintiff argues that § 14d(6) imposes a mandatory proration deadline, and prohibits the acceptance of shares tendered after that deadline. He alleges that defendant violated this provision by including in the proration pool, approximately three million Marathon shares which were not validly tendered by the proration date or delivered by the delivery date.

Defendants move to dismiss this claim on two grounds. First, they argue that this Court should not imply a right of action on behalf of plaintiff under § 14d(6) absent any indication, either in the language or legislative history of the statute, that Congress intended to create a private damages remedy. Second, defendants argue that § 14d(6) does not require that the proration pool be limited to shares tendered at a certain place or by a certain time;

rather, the deadlines and mechanics for the tender of shares are set by the terms of the tender offer. Since plaintiff's sole claim under § 14d(6) is that the defendants wrongfully accepted late-tendered shares for proration, defendants maintain that at best, plaintiff states only a common law claim for breach of contract.

Because the Court agrees with defendants that plaintiff has failed to allege a violation of § 14d(6), we find it unnecessary to reach the more general question of whether a shareholder who does allege injury stemming from a violation of § 14d(6) has a private damages remedy.

The question before us is apparently one of first impression. Plaintiff cannot point to a single case in which a shareholder has attempted to invoke § 14d(6) in the manner which he proposes.[6] However, it is neither the

---

[6]Although plaintiff cites numerous cases and other authorities we find that none of them are conclusive—or even very helpful—on the issue presented herein. The cases cited by plaintiff merely hold that pro rata acceptance of shares is mandatory, or that the tender offeror is not *required* to take up shares tendered after the proration deadline. *See e.g. Edgar v. MITE Corp.*, 102 S.Ct. 2629 (1982); *Schlesinger Investment Partnership v. Fluor Corp.*, 671 F.2d 739, 741 (2d Cir. 1982); *Indiana National Bank v. Mobil Oil Corp.*, 457 F. Supp. 1078, 1032 (S.D. Ind. 1977), *aff'd.* 578 F.2d 180, 182 (7th Cir. 1978). None of the cases cited raises the question whether the proration deadline itself is mandatory under § 14d(6).

The other commentary and legislative history relied on by plaintiff do reflect an understanding that as a practical matter, shares must be tendered within the ten day period in order to be accepted for proration. *See Bramberg, Sec. Law, Fraud, S.E.C. Rule 10b-5, 6.3 (530) (1967); Full Disclosure of Corporate Equity Ownership And In Corporate Takeover Bids: Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 82 (1967) (testimony of Philip West, vice-president, New York Stock Exchange).

However, they in no way suggest that the deadline is enforceable under § 14(d)(6), as opposed to under the terms of the offer itself.

novelty of plaintiff's position nor the absence of supporting authority which leads us to reject plaintiff's claim. As set forth below, we find no support for plaintiff's position in either the language or legislative history of the statute.

Section 14d(6) does not on its face impose a mandatory proration deadline. It merely provides that all shares tendered "within ten days" of the tender offer "shall be taken up as nearly as may be pro rata . . .". the mandate of Section 14d(6) necessarily implies that there must be at least ten days between the making of the tender offer and the proration deadline. However, as Rules 14d-8[7] and

---

[7]We refer to Rule 14d-8 as it existed at all times relevant to the present action. That Rule provided as follows:

17 C.F.R. § 240.14d-8 Exemption from statutory pro rata requirements.

The limited pro rata provisions of section 14(d)(6) of the Act shall not apply to any tender offer for less than all the outstanding securities of the class for which the tender offer is made to the extent that the bidder provides in the tender offer materials disseminated to security holders on the date of commencement of the tender offer that in the event more securities are deposited during the period(s) described in paragraphs (a) and/or (b) of this section than the bidder is bound or willing to accept for payment, all securities deposited during such period(s) will be accepted for payment as nearly as practicable on a pro rata basis, disregarding fractions, according to the number of securities deposited by each depositor.

(a) Any period which exceeds ten days from the date of commencement of the tender offer.

(b) Any period which exceeds ten days from the date that notice of an increase in the consideration offered is first published, sent or given to security holders.

Rule 14d-8 has since been revised to require that the offeror accept for proration all shares tendered before the expiration of the tender offer. The revised Rule 14d-8, applicable to all tender offers commenced after December 28, 1982, states:

17 C.F.R. § 240.14d-8 Exemption from statutory pro rata requirements.

(Continued on next page)

14d-6(e)(vi)[8] make clear, the actual proration deadline is left to the terms of the tender offer. Thus the language of § 14d(6) and the rules promulgated thereunder would suggest, as defendants contend, that the enforcement of the proration deadline is a matter of contract law.

Plaintiff argues, however, that the legislative purpose of Section 14d(6) will be undermined if the Section is not read to prohibit the acceptance for proration of shares tendered after the proration deadline. The Court cannot agree. Section 14d(6) is part of a larger scheme designed to protect shareholders of a target corporation who are faced with a tender offer. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977). Section 14d(6) in particular aims to provide shareholders with adequate time to make a reasoned and informed decision whether or not to tender

---

(Continued)

> Notwithstanding the pro rata provisions of section 14(d)(6) of the Act, if any person makes a tender offer or request or invitation for tenders for less than all of the outstanding equity securities of a class and if a greater number of securities are deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor during the period such offer, request or invitation remains open.

[8]Rule 14d-6(e)(vi) requires that the tender offer materials include the following:

> (vi) If the tender offer is for less than all of the outstanding securities of a class of equity securities and the bidder is not obligated to purchase all of the securities tendered, the period or periods, and in the case of the period from the commencement of the offer, the date of the expiration of such period during which the securities will be taken up pro rata pursuant to section 14(d)(6) of the Act or Rule 14d-8 (§ 240.14d-8), and the present intention or plan of the bidder with respect to the tender offer in the event of an oversubscription by security holders.

their shares. As explained by Senator Williams, the sponsor of the Williams Act, the purpose of the Section was to "outlaw tender offers on a first-come, first-served basis and thus eliminat[e] pressure on shareholders to make hasty deposits." 113 Cong. Rec. 854, 855 (January 13, 1967). This purpose is accomplished by establishing a *minimum* period of time, i.e., ten days, during which shareholders can decide whether to tender their shares, with the assurance that any shares tendered during that period will be included in the proration pool. In the present case, plaintiff does not claim that the minimum ten day proration period was not allowed by the defendants or that the shares which he tendered within the proration period were not accepted for proration. Thus the primary purpose of Section 14d(6), as well as the letter of the law, would seem to be complied with.

We do not disagree with plaintiff that the goal of § 14d(6) and the Williams Act in general goes beyond that of disclosure and seeks "to assure fair treatment of all shareholders who decide to accept a tender offer." Testimony of SEC Chairman Manuel Cohen at a Hearing Before the Senate Subcommittee on Securities, at 36. Pro rata acceptance of shares is "a method of achieving equitable treatment of all stockholders." *Id.* However, this does not mean that Congress intended to make any imperfection in a tender offer or in the proration process remediable under the Williams Act. Many important details of a tender offer, including the date, place and method of tender, are left to the terms of the offer itself, and are enforceable only on a breach of contract theory. We believe that the proration deadline is another such detail. Our holding does not, as plaintiff suggests, leave the offeror with unlimited discretion to accept late-tendered shares.

As noted above, the proration deadline established by the offeror must be included in the tender offer materials; failure to adhere to this deadline would presumably give rise to an action for breach of contract.[9] Furthermore, it might be argued that acceptance of a significant number of late tendered shares would amount to a *de facto* extension of the proration date without adequate notice to all shareholders as required by Rules 14d-6(d), 14d-6(e)(vi), and 14e-1(d). However, only those shareholders who were deprived of the opportunity to tender after the deadline would have standing to pursue such a claim. See discussion, *infra.*, at 50-52.

To hold that the proration deadline is enforceable under § 14d(6) would, we believe, unduly involve the federal courts in questions concerning the mechanics of a tender offer. In order to determine whether a purchaser properly accepted shares for proration, the courts would necessarily have to determine what constitutes valid tender under the terms of the tender offer, and whether all of the shares accepted were validly tendered by the proration deadline. Even a technical defect in tender, if waived by the purchaser, would presumably constitute a violation of § 14d(6).[10] In short, the federal securities law would be

---

[9]Although we have no occasion to rule on the merits of plaintiff's contract claim in the present opinion, we note that paragraph 5 of the tender offer, which reserves to the offeror the right to waive any defects or irregularities in the tender of shares, does not necessarily defeat such a claim. We would not construe paragraph 5 in a manner which would nullify the proration deadline set by the tender offer.

[10]The facts in this case are illustrative. The December 8th press release announced that about 54 million shares of Marathon stock had been *tendered*. The intermediate press announcements stated that approximately 51 million shares had been *perfected*. The final number of shares accepted for proration was close to the 54 million figure. One possible interpretation of these facts is that U.S. Steel accepted several

(Continued on next page)

converted into an ominbus tool for enforcing the terms of a tender offer. We do not believe that Congress intended such a result.

In sum, based on the plain language of § 14d(6) and the rules promulgated thereunder, the legislative history of the statute, and the absence of any judicial authority to the contrary, we conclude that the plaintiff's allegations that the defendants accepted for proration shares tendered after the proration deadline, do not state a claim under § 14d(6). Accordingly, plaintiff's First Cause of Action must be dismissed.

Section 14(e) Claim

Plaintiff's second claim, arising under the anti-fraud provision of the Williams Act,[11] is based on an alternative statement of the facts. The Second Amended Complaint alleges that the press releases issued by defendants contained material misstatments as to the number of shares tendered or perfected by the proration date, which were

---

(Continued)

million shares for proration, with respect to which tender had been *attempted* but not *perfected* by the proration date ("perfection" meaning the completion of a check on the validity of each share's certificate and the matching of certificate against prior guarantees of delivery). Under plaintiff's proposed construction of § 14d(6), defendant's acceptance of these shares would presumably constitute a violation of the securities law, solely because the tender of these shares was technically deficient.

[11]Section 14(e) of the Williams Act provides in relevant part:

> [e] It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

relied on by plaintiff in deciding not to engage in hedging transactions with respect to the shares which he believed the defendants would purchase, and that plaintiff suffered monetary damage as a result.

Defendants argue that plaintiff's § 14(e) claim is fatally defective in several respects. First, they claim that because plaintiff's injury does not arise out of his decision to tender, it is not remediable under § 14(e). In addition, defendants claim that plaintiff has failed to adequately plead the essential elements of a fraud claim, including scienter, materiality, reliance, injury and causation. Each of defendants' claims are discussed separately below.

Plaintiff's Failure to Claim Injury Arising Out of His Decision Whether to Tender

Defendants contend that "[s]ince there is no averment that defendants' allegedly misleading statements impacted any shareholder's decision to tender or withdraw his Marathon shares, this case simply does not present the evil which § 14(e) was designed to remedy." Memorandum of Defendants United States Steel Corporation and USS, Inc. in Support of Motion to Dismiss Second Amended Complaint, at 2. Defendants draw on the legislative history of § 14(e) which, in the words of the Supreme Court, reveals that the "sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Piper v. Chris-Craft Industries Inc.*, 430 U.S. 1, 35 (1977) ("*Chris-Craft*"). In light of this purpose, defendants argue that a shareholder in the position of plaintiff, whose alleged injury did not arise from his decision whether or not to tender, does not have standing to bring a cause of action under § 14(e).

Plaintiff responds that §14(e) broadly prohibits fraud "in connection with a tender offer." Relying on Judge Lasker's decision in *O'Connor & Associates v. Dean Witter Reynolds, Inc.*, 529 F.Supp. 1179 (S.D.N.Y. 1981), plaintiff argues that as long as the alleged mistatements which gave rise to his injury were made "in connection with a tender offer", the fact that he was engaging in option transactions at the time he was injured, should not defeat his cause of action under § 14(e).

Although the Supreme Court in *Chris-Craft, supra*, at 42n.28, expressly reserved decision on the issue, the lower courts have uniformly implied rights of action under § 14(e), on behalf of both tendering and non-tendering shareholders injured by fraudulent misrepresentations impacting on their decisions whether to tender. *See, e.g., Stull v. Bayard*, 561 F.2d 429, 432 (2d Cir. 1977) ("Although § 14(e) does not specifically provide plaintiff a cause of action for this deprivation such a right to sue has generally been inferred"), *cert. denied*, 434 U.S. 1035 (1978); *Electronic Specialty Co. v. International & Controls Corp.*, 409 F.2d 937, 940 (2d Cir. 1969); *Meyers v. American Leisure Time Enterprises, Inc.*, 402 F.Supp. 213, 214 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 312 (2d Cir. 1976); *Petersen v. Federated Development Co.*, 416 F.Supp. 466, 472n.2 (S.D.N.Y. 1976); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 596 (5th Cir. 1974), *cert. denied*, 419 U.S. 873 (1974); *In re Com. Oil/Tesoro Petroleum Corp. Sec. Lit.*, 467 F. Supp. 227, 242 (W.D. Tex. 1979); *Hurwitz v. R.B. Jones Corp.*, 76 F.R.D. 149 (W.D. Mo. 1977); *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 50 (D.N.J. 1974); *contra, Neuman, v. Electronic Specialty Co.*, Fed. Sec. L.Rep. (CCH) ¶ 92, 591 (N.D. Ill. 1969) (since non-tendering shareholders are neither purchasers nor sellers of securities

they have no standing to sue for damages under either 10b-5 or § 14(e)). However, few courts have considered whether shareholders who claim reliance and injury outside of their decisions whether to tender, have standing to sue under § 14(e). Those which have, have reached differing results. *See O'Connor & Associates v. Dean Witter Reynolds, Inc., supra; Panter v. Marshall Field & Co.*, 646 F.2d 721 (7th Cir. 1981).[12] Furthermore, in both *O'Connor* and *Panter*, the plaintiffs alleged injury resulting from pre-tender offer decisions, where impending tender offers

[12]Judge Lasker, in *O'Connor*, concluded that an options trader who alleged injury arising out of pre-tender offer trading in the options of the target company, as a result of an insider's failure to disclose an impending announcement of a tender offer proposal, stated a claim under § 14(e) and Rule 14e-3, the Rule prohibiting insider trading. In so holding, Judge Lasker rejected the defendants' contention that the Williams Act was intended to regulate only transactions between the tender offeror and target shareholders and not open market transactions. He refused to find that plaintiff lacked standing because he traded in options rather than the shares of the target company. Judge Lasker also rejected defendants' argument that § 14(e) applied only when an actual tender offer has been made, stating that, "the alleged failure to disclose the impending announcement of the tender offer proposal worked to deny the target investor the relevant information on which to decide whether to sell his shares in the same manner as fraudulent conduct operations when an offer has been publicly announced." *Id.* at 1191.

In *Panter*, the 7th Circuit held that target shareholders who alleged injury arising from their pre-tender offer decisions not to sell their shares in the open market, did not have a claim under § 14(e). The Court found that "a damages remedy for investors who determine not to sell in the marketplace when no tender offer ever takes place was not intended to be covered by § 14(e) of the statute" *Id.* at 285. The Court relied on both the language of § 14(e) which makes the statute applicable to fraud "in connection with a tender offer", and the legislative history of the Act, which in the Court's view, revealed "that Congress intended to protect an investor faced with the pressures generated by the exigencies of the tender offer context, and that the sole purpose of § 14(e) is protection of the investor faced with the decision to tender or retain his shares." *Id.* The Court found that shareholders in a pre-tender offer

(Continued on next page)

never became effective. Thus the courts in those cases were faced with the question not presented here, of whether the alleged misstatements/omissions were made "in connection with" a tender offer. Our research has disclosed no cases which have addressed the precise issue raised herein.

In considering the scope of a cause of action under § 14(e), we are mindful that "Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purpose'". *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151, (1972) *quoting, SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963). At the same time, we recognize that "generalized references to the 'remedial purposes'" of the securities laws "will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) *quoting, SEC v. Sloan*, 436 U.S. 103, 116 (1978).

There is nothing in the language of § 14(e) which would limit the applicability of the statute in the manner proposed by defendants. Section 14(e) prohibits any untrue statements made in connection with any tender offer. Defendants do not and cannot deny that the allegedly false statements in this case were made in connection with a tender offer. They were made by the offeror during the

---

(Continued)

situation "were simply not subject tothe proscribed pressures the Williams Act was designed to alleviate." *Id.* at 296. The Court also dismissed plaintiff's claim that misrepresentations made by the target company during the pre-tender offer period caused the tender offer to fall through, thus depriving the shareholders of the opportunity to tender their shares to the offeror at the premium market rate, on the ground that plaintiffs had alleged no reliance. *Id.* at 284-85.

course of the tender offer and pertained directly to shares which had been tendered pursuant to the tender offer.[13]

Turning to the history and purpose of the statute, it is undeniable that Congress' primary concern, in enacting § 14(e) was with the dilemma of shareholders faced with the decision whether or not to tender their shares. As Senator Williams stated during the congressional hearings:

> Today, the public stockholder in deciding whether to reject or accept a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent.

113 Cong. Rec. 24662-66 (1967). Further:

> In the rather common situation where existing management or third parties contest a tender offer, shareholders may be exposed to a bewildering variety of conflicting appeals and arguments designed to persuade them either to accept or to reject the tender offer.

Id., at 855-56.[14] There is no discussion in the legislative history of any other type of decision which a shareholder

---

[13]In fact, the offer itself stated that an announcement as to the final proration factor would be made approximately nine New York Stock Exchange ("NYSE") trading days after the proration date. See Offer to Purchase, Section 1, p. 3.

[14]A Senate Report similarly focused on the dilemma of a shareholder confronted with the decision whether to tender:

> He has many alternatives. He can tender all of his shares immediately and hope they are all purchased. However, if the offer is for less than all the outstanding shares, perhaps only a part of them will be taken. In these instances, he will remain a shareholder in the

(Continued on next page)

might face in connection with a tender offer. However, we do not infer from this silence any intent on the part of Congress to limit the Act's protection to shareholders confronted with the decision whether to tender.

As the facts of the present case illustrate, the decision whether to accept or reject a tender offer is not the only significant decision which a target shareholder may face in the tender offer context. *See also O'Connor & Associates v. Dean Witter Reynolds, Inc., supra,* 529 F. Supp. at 1191. Nor is it the only decision to which statements made "in connection with" a tender offer may be material. According to the facts alleged herein, plaintiff, having decided to tender his shares, was subsequently confronted with the decision how to best dispose of the shares which would be returned to him unpurchased; one alternative was to sell options with respect to these shares prior to their actual return. Given the fact that the tender offer was for less than the total number of outstanding securities, and thus subject to the proration requirement of § 14(d)(6), the dilemma which plaintiff faced was a readily foreseeable consequence of his decision to tender. Moreover, plaintiff was totally dependent on the offeror to provide him with the facts upon which to make an informed decision; only the offeror had knowledge of how many shares had been properly tendered by the proration deadline. Thus as with

---

(Continued)

> company, under a new management which he has helped to install without knowing whether it will be good or bad for the company.
>
> The shareholder, as another alternative, may wait to see if a better offer develops, but if he tenders late, he runs the risk that none of his shares will be taken. He may also sell his shares in the market or hold them and hope for the best. Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision.

S. Rep. No. 550, 90th Cong., 1st Sess. 2-3 (1967).

the decision to tender, the need for informed decision-making was great, and the possible consequences of a decision based on erroneous information was significant and foreseeable.

In short, this Court can find no principled reason to exclude a shareholder in the position of plaintiff from the protection of § 14(e).[15] Therefore, in the absence of any affirmative indication of congressional intent, we are unwilling to assume that Congress intended to so limit the scope of § 14(e).

Defendant relies heavily on the "sole purpose" language of the Supreme Court in *Chris-Craft, supra.* However, as Judge Lasker observed in *O'Connor, supra,* "that statement was made in the context of the Court's consideration of the issue whether there existed a 'private cause of action for damages by one of several contending offerors against a successful bidder or by a losing contender against the target corporation.'" *Id.* at 1192, *quoting Chris-Craft, supra,* at 35. The Court had no occasion to consider which type of shareholders the statute was designed to protect, or which types of injuries the statute was designed to remedy. therefore, nothing in the *Chris-Craft* decision is determinative of the issue before us.

Likewise, the Second Circuit's decision in *Lewis v. McGraw,* 619 F.2d 192 (2d Cir. 1980), *cert. denied,* 449 U.S. 951 (1981), is not controlling. In *McGraw,* the target

---

[15]In holding that this plaintiff has standing to sue under § 14(e), we do not mean to suggest that every conceivable injury suffered by a shareholder as a result of fraud "in connection with" a tender offer is remediable under the statute. There may be some shareholder decisions and resultant injuries, which are simply too remote from the decision whether to tender to warrant Williams Act protection.

shareholders sued the corporation and its directors, alleging that the board made false statements of material facts in response to a proposed tender offer. The shareholders claimed that had the board provided complete truthful information, the tender offer would have been consummated. The Court of Appeals affirmed the district court's dismissal of the complaint, for failure to allege reliance, an essential element of a cause of action under § 14(e). The Court reasoned that the shareholders could not possibly have relied on the alleged misrepresentations by the target corporation, since they were never given an opportunity to tender their shares. In response to the plaintiff's argument that reliance should be presumed from materiality, the Court stated that, "[h]ere, where no reliance was possible under any imaginable set of facts, such a presumption would be illogical in the extreme." *Id.* at 195. In the present case, unlike *McGraw,* plaintiff alleges that he relied on defendants' alleged misrepresentations, in connection with his hedging activities. Therefore, we cannot say that no reliance was possible. Like Judge Lasker, "we do not read the *McGraw* opinion to constitute a broad interpretation of the general reach of § 14(e), but rather to consider the statute's application in the circumstances of that case." *Id.* at 1192-93.

Finally, defendants argue that the rationale of the Supreme Court's decision in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975),precludes a shareholder in plaintiff's position, from asserting a claim under § 14(e). In *Blue Chip,* the Supreme Court held that since the plaintiff was neither a purchaser or seller of the securities in issue, he had no standing to sue under § 10(b) and Rule

10b-5, which prohibit fraudulent misstatements or omissions in connection with the purchase or sale of any security. The Court refused to recognize a claim based on the plaintiff's *failure* to buy or sell the security in question. Defendants argue that *"[a] fortiori,* there can be no claim where, as here, there is a claimed failure to buy or sell a security (i.e., a "put" or a "call") different from the security (the Marathon shares) to which the alleged misrepresentation relates. [footnote omitted]." Memorandum of Defendants United States Steel Corporation and USS, Inc. in support of Motion To Dismiss the Second Amended Complaint at 3.[16]

---

[16]Defendants claim that the policy concerns expressed by the Supreme Court in *Blue Chip* are equally apt in the present case. The Court reasoned that without a purchaser-seller requirement, an action under 10b-5 would:

> turn largely on which oral version of a series of occurrences the jury may decide to credit, and therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of prior to trial other than by settlement.

Id. 742.

> Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon the uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighting the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him."

Id. at 746 [Emphasis in original, footnote omitted].

(Continued on next page)

This Court does not agree that the *Blue Chip* decision warrants dismissal of plaintiff's § 14(e) claim. Section 10(b), the statute at issue in *Blue Chip,* and Rule 10b-5, explicitly prohibit fraud in connection with a "purchase" or "sale" of securities. Since § 14(e) has no such language, there is no basis for reading a purchaser/seller requirement into it. Thus the courts have held that non-tendering shareholders as well as tendering shareholders, have standing to sue under § 14(e), notwithstanding the holding in *Blue Chip Stamps. See Hundahl v. United Benefit Life Ins. Co.,* 465 F.Supp. 1349 (N.D. Tex 1979); *Hurwitz v. R.B. Jones Corp.,* 76 F.R.D. 149 (W.D. Mo. 1977). Moreover, plaintiff claims that he did engage in hedging transactions with respect to at least some of the shares he expected would be returned to him. Thus, his claim that he would have hedged with respect to the 3.2% which he did not know would be returned, is not totally dependent upon uncorroborated oral evidence.

For all of the foregoing reasons, this Court concludes that plaintiff's § 14(e) claim should not be dismissed for lack of standing.

Scienter

Defendants argue that the Second Amended Complaint fails to adequately plead "scienter", i.e., intentional or reckless conduct, on the part of defendants. According to defendants, the facts as alleged by plaintiffs at best raise

---

(Continued)

According to the defendants, plaintiff's claim that he would have done something with the additional 3.2% of stock, had he known that that stock would be returned to him, would rest purely on uncorroborated oral evidence as to plaintiff's intent. Defendants would have no way of disproving the internal operations of plaintiff's mind, and the minds of the members of the proposed class.

an inference of negligence. In particular, defendants emphasize the total absence of any facts from which a motive for the fraud alleged might be inferred.

In response, plaintiff argues that there are two operative portions of § 14(e), the first of which imposes an obligation of full disclosure, and the second of which prohibits fraud.[17] According to plaintiff, the first clause of § 14(e), i.e., the disclosure requirement, does not require a showing of scienter. Alternatively, plaintiff maintains that even if scienter is an essential element of his § 14(e) claim, he has adequately pleaded scienter in accordance with the federal rule that "intent" and "condition of mind" need only be averred generally. Plaintiff rejects defendant's suggestion that plaintiff must speculate as to the possible motive defendants may have had for making the alleged misrepresentations.

Plaintiff's argument that a showing of scienter is not a requirement in every action brought under § 14(e) is contrary to precedent in this circuit and others. Because of the close similarity between § 14(e) and Rule 10b-5, in both language and purpose, courts have consistently held that the elements of a cause of action under § 14(e) and Rule 10b-5 are the same, with the exception of the standing requirement,[18] and have applied the case law under each interchangeably. *See, e.g., Chris-Craft Industries, Inc. v.*

---

[17]The first clause referred to by plaintiff makes it unlawful for "any person to make any untrue statement of a material fact . . . ". The second clause makes it unlawful "to engage in any fraudulent, deceptive, or manipulative acts or practices."

[18]Rule 10b-5 is applicable only "in connection with the purchase or sale of any security." As construed by the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), an action under 10b-5 can only be brought by a purchaser or seller of a security. There is no comparable standing requirement in an action under § 14(e) since § 14(e) applies "in connection with any tender offer . . . "

Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973); *Atchley v. Qonaar Corp.*, 704 F.2d 355, 359 (7th Cir. 1983); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980); *Berman v. Gerber Products Co.*, 454 F.Supp. 1310, 1316 (W.D. Mich. 1978); *SEC v. Texas International Co.*, 498 F.Supp. 1231 (N.D. 111. 1980); *Applied Digital Data Systems v. Milgo Electronic*, 425 F.Supp. 1145, 1157 (S.D.N.Y. 1977). It is firmly established that an action under Rule 10b-5 requires a showing of scienter, *i.e.*, "intent" to deceive, manipulate or defraud." *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Therefore, we conclude that proof of scienter is also required in an action under § 14(e). *See Indiana National Bank v. Mobil Oil Corp., supra*, 578 F.2d 180, 184 n.10; *Lowenschuss v. Kane*, 520 F.2d 255, 268 (2d Cir. 1975); *Chris-Craft Industries, Inc. v. Piper Aircraft Corp., supra*, 480 F.2d at 363-64; *Adams v. Standard Knitting Mills, Inc., supra*, 623 F.2d at 431; *Morgan v. Prudential Group, Inc., supra*, 81 F.R.D. 418, 426 (S.D.N.Y. 1978); *Applied Digital Data Systems v. Milgo Electronic supra*, 425 F.Supp. at 1157.[19]

---

[19]The Court recognizes that the analogy drawn between Rule 10b-5 and § 14(e) is, with respect to the issue of scienter, somewhat imperfect in light of the *Ernst & Ernst* decision. In holding that a violation of Rule 10b-5 requires proof of scienter, the Supreme Court relied heavily on the language of § 10(b), the statute under which Rule 10b-5 was promulgated. In particular, the Court found that the use of the words "manipulative or deceptive" and "device or contrivance" strongly suggested that Congress intended to proscribe only knowing or intentional misconduct. *Ernst & Ernst v. Hochfelder, supra*, 425 U.S. at 197. As the Sixth Circuit noted in *Adams v. Standard Knitting Mills, Inc., supra*, 623 F.2d at 430, Congress also used the words "fraudulent", "deceptive" and "manipulative" in § 14(e). However, the language and structure of § 14(e) is otherwise completely different from that of § 10(b). As plaintiff points out, § 14(e) consists of two clauses, arguably two separate proscriptions, which are separated by the word "or". The second clause uses the words found to be signficant in *Ernst & Ernst*. The first clause

(Continued on next page)

Under the law of this circuit, the scienter requirement does not mean that plaintiff must prove intent to defraud; a showing that defendants had knowledge of the falsity of

---

(Continued)

merely states that it shall be unlawful "for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." This is precisely the language of paragraph (b) of Rule 10b-5, about which the Supreme Court stated:

> Viewed in isolation, the language of subsection (b), . . . could be read as proscribing, . . . any type of material misstatement or omission, . . . that has the effect of defrauding investors, whether the wrongdoing was intentional or not.

Ernst & Ernst v. Hochfelder, supra, at 212. However, the Court ultimately rejected this reading of Rule 10b-5 on the grounds that it would be inconsistent with the administrative history of the Rule and even more importantly, would exceed the power granted the Commission under § 10(b). *Id.* at 212-214.

In *Aaron v. SEC,* 446 U.S. 680 (1979), the Supreme Court again construed language similar to that found in the first clause of § 14(e) and paragraph (b) of Rule 10b-5. The Court found that Section 17(a) of the Securities Act of 1933 required scienter under sub-section (a)(1), but not under sub-section (a)(2) or (a)(3). As the Court stated:

> By contrast [to the language of (a)(1)], the language of 17(a)(2), which prohibits any person from obtaining money or property "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion whatsoever of a scienter requirement. As a well-known commentator has noted "[t]here is nothing on the face of Clause (2) itself which smacks of *scienter* or intent to defraud." 3 L.Loss, *Securities Regulation* 1442 (2d ed. 1961).

Id. at 696. The Court concluded that since there was no expression of legislative intent in the legislative history of the Act, the plain meaning of the statute must prevail. *Id.* at 697, 700.

In light of the Supreme Court's dicta regarding the language of Rule 10b-5 in *Ernst and Ernst* and its subsequent decision in *Aaron*, we find that the language of § 14(e) raises problems of construction which simply were not present in *Ernst and Ernst*. Whereas the Supreme Court deemed the language of § 10(b) to be clear on the issue of scienter, the language of § 14(e) is not. Furthermore, there is no clear indication in

(Continued on next page)

their statements or reckless disregard for the truth is sufficient.[20] *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 45-47 (2d Cir. 1978); *IIT v. Cornfeld*, 619 F.2d 909, 923 (2d Cir. 1980); *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1300-02 (2d Cir. 1973); *Chris-Craft, supra*, 480 F.2d at 363. A showing of mere negligent conduct, however, will not suffice. *Chris-Craft, supra*, 480 F.2d at 363. We therefore turn to the question of whether plaintiff has adequately pleaded knowing, intentional, or reckless conduct on the part of the defendants.

We note from the outset that Rule 9(b) of the Federal Rules of Civil Procedure does not require the same specificity of pleading with respect to intent and knowledge as it does with respect to the other elements of fraud. *Zaretsky v. E.F. Hutton & Co., Inc.*, 509 F.Supp. 68 (S.D.N.Y. 1981). By its own terms Rule 9(b) provides that "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally." Nevertheless, to survive a motion to dismiss, the facts alleged in the complaint "must be such as to permit an inference of fraud." *Denny v. Barber*, 73 F.R.D. 6, 9 (S.D.N.Y. 1977). This does not mean, as defendants would have it, that the facts pleaded

---

(Continued)

the legislative history of § 14(e) as to congressional intent with respect to a scienter requirement.

Despite our reservations about applying the holding in *Ernst and Ernst* to an action under § 14(e), we are not inclined to deviate from clear Second Circuit authority holding that the principles governing Rule 10b-5, should also be applied under § 14(e). Accordingly, we hold that scienter is an essential element of a cause of action under § 14(e).

[20] "Reckless conduct is, at the least, conduct which is 'highly unreasonable' and which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.' [citation omitted]." *Rolf v. Blyth, Eastman Dillon & Co., Inc., supra*, 570 F.2d at 47.

must suggest the defendants' *motive.*[21] It is sufficient that facts alleged give rise to an inference that the defendants acted knowingly or recklessly. *See Ross v. A.H. Robins Company, Inc.*, 607 F.2d 545, 558 (2d Cir. 1979) In the present case, plaintiff must allege facts which permit an inference that as of December 17 and December 24, 1981, defendants had knowledge of how many shares had actually been tendered by the proration deadline, or recklessly failed or refused to ascertain the number from information available to them.

The relevant section of the Complaint is found in paragraphs 59-65 wherein plaintiff alleges that the defendants had both a duty to know and the means to know how many shares had been perfected as of the proration deadline. In particular, plaintiff alleges that during all relevant times defendants had the staff, facility and resources adequate to determine the number of shares tendered, and in fact maintained a comprehensive system of records, including records maintained in computers. Plaintiff claims specifically that defendant Bankers Trust "maintained and operated a comprehensive, computerized electronic data processing system for recording and generating up-to-the-minute information and tallies and summaries of shares tendered, guaranteed, delivered, perfected, withdrawn, eligible for purchase and accepted to be accepted for purchase," Second Amended Complaint ¶ 64. In addition, plaintiff alleges that Bankers Trust had a duty to provide such information to the other defendants and in

---

[21]We agree with defendants that it is difficult to fathom any way in which the defendants could have benefited from the fraud alleged in this case, and we have no doubt that this apparent lack of motive will be a significant factor at trial. However, we do not believe that the absence of personal motive is conclusive on the issue of scienter and we therefore decline to dismiss plaintiff's § 14(e) claim on this ground.

fact, "Bankers Trust prepared and provided regular written reports of such information (including a report entitled 'Daily Report of Securities Tendered') to defendant [U.S. Steel] and its other agents, and in addition made frequent verbal or telephoned reports of such information to defendant U.S. Steel and its other agents." Second Amended Complaint ¶ 65.

Whether these allegations are sufficient to support a claim of fraud is a close question. While the facts alleged *permit* an inference that the defendants acted recklessly or with knowledge, they just as easily permit an inference that one or more of the defendants were negligent, either in their record-keeping or in the carrying out of their duty to accurately convey the information which they had recorded.[22] In fact, the inference of negligence may be somewhat stronger than the inference of scienter, in light of the defendants' apparent lack of motive to commit fraud. Nevertheless, although we are doubtful of plaintiff's ability to prove scienter at trial we do not believe the issue can be decided on the pleadings. Therefore, defendants' motion to dismiss plaintiff's § 14(e) claim on this ground will be denied.

---

[22]We note that in paragraphs 50 and 68 of the Complaint, plaintiff himself, appears to be alleging negligence in the alternative. These paragraphs contain "or should have known" clauses which would not alone satisfy the scienter requirement. However, since these paragraphs allege in the disjunctive that defendants "knew" of their misrepresentations, they are adequate as a matter of pleading to allege scienter. *See IIT v. Cornfeld, supra,* 619 F.2d at 924.

Materiality

Defendants also argue that plaintiff has failed to adequately plead materiality.[23] In Paragraph 74 of the Second Amended Complaint plaintiff alleges:

> The number of shares validly tendered by delivery within the proration deadline, from which the proration factor and the number of Unpurchased Shares are calculated, was a material fact of substantial significance to plaintiff and to all tendering shareholders who wished to or did attempt to reduce losses incurred in connection with the sale or disposition of Unpurchased Shares by engaging in short sales or other hedging transactions for the purpose of protecting themselves against the risks of proration.

Plaintiff also argues that information as to the true number of Marathon shares deposited by midnight of December 16 was "obviously 'material'" because "any change . . . would alter the amount the shareholder will receive" and thus "would be of significance to a shareholder in determining what to do." Plaintiff's Memorandum in Opposition at 73,74. Defendants maintain that plaintiff's general allegation as to materiality is totally

---

[23]It is undisputed that to establish a violation of § 14(e) plaintiff must establish the materiality of the misstatements which defendants allegedly made. Under § 14(e) a misstatement or omission is "material if there is a substantial likelihood that a reasonable shareholder would consider it important" to his decision whether to tender or as we have decided here, to his decision how to best dispose of tendered shares which will be returned to him unpurchased. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Seaboard World Airlines, Inc. v. Tiger International, Inc.*, 600 F.2d 355, 361 (2d Cir. 1979).

> Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

TSC Industries, supra, at 449.

unsupported by, and in fact inconsistent with, other facts alleged in the Complaint.

Defendants argue first that the use of the word "approximately" in both the December 17 and 21 press releases, makes clear that the press releases did not purport to give an exact count of the numbers of shares tendered, or of shares tendered which had been perfected, but only a rough figure. Defendants also question how there could be any "material" difference between "approximately 51 million" shares and the "53,880,360 shares" actually accepted for proration. Defendants' contentions raise two related questions: first, is there "a substantial likelihood that a reasonable shareholder" would consider such an "approximate" figure important to any investment decision?; and second, would a reasonable shareholder find that "approximately 51 million" shares is materially different than "53.88 million shares"?

Defendants further argue that because plaintiff has failed to allege that he hedged *all* of the shares that he thought would be returned to him unpurchased there is no basis for assuming that plaintiff would have hedged with respect to the additional 3.2% of the shares which were unexpectedly returned to him. In other words, since there is no allegation from which it can be inferred that the additional 3.2% would have been relevant to any hedging decision which plaintiff made or might have made, the allegedly erroneous press releases should be found to be immaterial as a matter of law.

Although we believe that each of these issues may pose serious problems for plaintiff at trial, we do not believe that they can be resolved against plaintiff as a matter of law. What the Supreme Court said of the materiality

question in the context of a summary judgment motion is equally apt here:

> The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate, (footnote omitted) we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. [footnote omitted].

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976). Accordingly, we conclude that plaintiff should be given the opportunity to prove the materiality of defendants' alleged misstatements at trial.[24]

Reliance, Injury and Loss Causation

The Second Amended Complaint is particularly sketchy in the area of reliance and injury. Plaintiff alleges that he reasonably relied on defendants' press releases to determine the number of unpurchased shares which were to be returned to him. In order to reduce losses which he expected would be incurred in connection with the sale of the unpurchased shares, plaintiff engaged in a series of

---

[24]Plaintiff states in his latest Memorandum that he "expects to be able to prove at trial that shareholders and the financial community reasonably expected defendants' announcements to be substantially correct and accurate, and that the words 'approximately 51 million' shares were not commonly interpreted to mean 'maybe 54 million.'"

hedging transactions during the period of the tender offer. Because of his reliance on defendants' statements, plaintiff allegedly suffered financial injury and losses because he was forced to sell the additional unpurchased shares at the lower market prices prevailing on and after January 7, 1982. *See* ¶¶ 70, 77-80 of the Second Amended Complaint.

More significant than what is included in the Complaint, is what is missing. The Complaint totally fails to allege the details of plaintiff's hedging transactions, including the type of hedging transactions plaintiff engaged in, how many shares were included in the transactions, precisely when the transactions took place,[25] what specifically caused plaintiff's financial losses, what specifically plaintiff would have done to prevent those losses had he had the correct information, and whether he was actually able to cut his losses with respect to the shares he did hedge on.[26]

---

[25]Although plaintiff alleges that the transactions occurred during the period of the tender offer, he does not allege when they occurred in relation to the various announcements. As the defendants point out, the sequence of events is relevant to the issue of reliance:

> If plaintiff engaged in hedging transactions before December 8, he did so on the basis of no announcements as to the number of shares tendered, because there were none. If he engaged in hedging transactions between December 8 and December 17, then he did so in reliance upon what ultimately proved to be the correct number of shares tendered, i.e. the December 8 announcement of "about 54 million shares."

Memorandum of Bankers Trust Company in Respect of the Fourth Claim in the Second Amended Complaint.

[26]We assume that the essence of plaintiff's claim is that he lost money because he did not hedge with respect to any of the shares he believed would be purchased. We assume further that plaintiff claims he would have hedged with respect to the 3.2% additional shares which were returned to him had he known that such shares would not be purchased and that he would have been able to sell them at a higher price than he was able to after January 6. However, none of these

(Continued on next page)

In light of these omissions, the Court finds that the Second Amended Complaint is not sufficiently specific in the areas of reliance, injury and causation to satisfy Rule 9(b). However, plaintiff will be granted one final opportunity to amend the Complaint.

Plaintiff's Claims Under Rules 14d-6(d), 14d-6(c) and 14e-1(d)

Plaintiff has also made claims under Rule 14d-6(d), 14d-6(e) and 14e-1(d). Each of these rules seeks to protect target company shareholders faced with a tender offer decision by imposing disclosure requirements on the tender offeror.[27] Plaintiff argues that defendants violated these

---

(Continued)

allegations are clearly spelled out in the Complaint. In fact, the Complaint states that plaintiff "suffered financial injury and losses *in connection with his hedging transactions* and with the eventual disposition or sale of Unpurchased Shares." If plaintiff in fact lost money by hedging, he presumably would have lost *more* money if he had engaged in additional hedging with respect to the 3.2%. This suggests that plaintiff's losses were caused by the tender offer itself, and its subsequent effect on the market, and not by the alleged misrepresentations by the defendants.

[27]The rules provide in pertinent part as follows:

Rule 14d-6(d)

(d) Material changes. A material change in the information published or sent or given to security holders shall be promptly disclosed to security holders in additional tender offer materials.

Rule 14d-6(e)

(e) Information to be included—(1) Long-form publication and tender offer materials. The information required to be disclosed by paragraphs (a)(1), (a)(2)(ii), (a)(3)(i)(B) and a(4) of this section shall include the following:

(iv) The scheduled expiration date of the tender offer, whether the tender offer may be extended and, if so, the procedures for extension of the tender offer.

(vi) If the tender offer is for less than all the outstanding securities of a class of equity securities and the bidder is not obligated to

(Continued on next page)

rules by failing to disclose to all shareholders that late-tendered shares would be accepted for proration, or, in other words, that the proration deadline was being extended.

The problem with plaintiff's claim under the disclosure rules is one of standing. Plaintiff does not and cannot claim that he would have tendered or withdrawn his shares after December 4, 1981, had he known that the proration deadline was being "extended". Thus even assuming that plaintiff alleges a violation of the disclosure rules, he does not allege the type of injury which the rules were designed to prevent. In fact, the only injury which plaintiff alleges, that which allegedly occurred in connection with his hedging activities, does not in any way flow from the defendant's failure to disclose an extension of the proration period. If the injury occurred at all, it occurred because of

---

(Continued)

purchase all of the securities tendered, the period or periods, and in the case of the period from the commencement of the offer, the date of the expiration of such period during which the securities will be taken up pro rata pursuant to section 14(d)(6) of the Act or Rule 14d-8 (§ 240.14d-8), and the present intention or plan of the bidder with respect to the tender offer in the event of an oversubscription by security holders;

Rule 14e-1(d)

As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall:

(d) Extend the length of a tender offer without issuing a notice of such extension by press release or other public announcement, which notice shall include disclosure of the approximate number of securities deposited to date and shall be issued no later than the earlier of: (i) 9:00 a.m. Eastern time, on the next business day after the scheduled expiration date of the offer or (ii) if the class of securities which is the subject of the tender offer is registered on one or more national securities exchanges, the first opening of any one of such exchanges on the next business day after the scheduled expiration date of the offer.

defendant's failure to disclose the correct number of shares tendered by the proration deadline. However, the rules relied on by plaintiff do not require such disclosure. Accordingly, since plaintiff lacks standing to bring claims under the disclosure rules, these claims must be dismissed.

Plaintiff's Claim Under Rule 10b-13

Rule 10b-13 prohibits a tender offeror from purchasing target company securities during the effective period of the tender offer "otherwise than pursuant to" the tender offer.[28] Plaintiff apparently claims that by including late-tendered shares in the proration pool, defendants purchased these shares "otherwise than pursuant to" the offer.[29] Under plaintiff's theory it would seem that any deviation, however minor, from the terms of a tender offer in the purchase of shares, would constitute a violation of 10b-13. We do not believe that the SEC intended such a result.

The purpose of the SEC in promulgating Rule 10b-13 was:

---

[28]Rule 10b-13 provides in pertinent part:

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected . . .

17 C.F.R. § 240.10b-13.

[29]We note that the 10b-13 issue was not briefed by plaintiff in his responsive papers to defendants' motion to dismiss.

> to safeguard the interests of the persons who have tendered their securities pursuant to the stated terms of a tender offer by prohibiting the offeror from making any 'outside' purchases on different terms during the offer's duration.

Heine v. The Signal Companies, Inc., [1976-1977 Transfer Binder] Fed. Sec.L. Rep. (CCH) ¶ 95,898 (S.D.N.Y. 1977). In particular, Rule 10b-13 was designed to prevent "outside purchases" by the offeror at a different price than that stated in the tender offer. *See Wellman v. Dickinson,* 475 F.Supp. 783, 833 (S.D.N.Y. 1979); *Warren v. Bokum Resources Corp.*, 433 F.Supp. 1360, 1367 (D.N.M. 1977); Bloomenthal, *Securities and Federal Corporate Law* § 13.28[f](1981); Lowenfels, *Rule 10b-13, Rule 10b-6 and Purchases of Target Company Securities During an Exchange Offer,* 69 Colum. L. Rev. 1392 (1969); SEC Securities Exchange Act Release No. 8712 (Oct. 8, 1969); SEC Securities Exchange Act Release No. 8595 (May 5, 1969); SEC Exchange Act Release No. 8391 (Aug. 30, 1968).

In the present case, plaintiff challenges purchases which were made using the same proration formula and for the same price as every other purchase under the tender offer, including the purchase of plaintiff's own shares. As defendants point out, plaintiff is not really claiming that purchases from the late-tendering shareholders were made outside of the tender offer, but rather, that the "late-tendering shareholders were wrongfully allowed to *participate* in the Offer as if they had made a valid tender." Defendants' April 15, 1982, Memorandum in Support of Motion to Dismiss at 35-36. Therefore, plaintiff does not have a cause of action under Rule 10b-13.

Plaintiff's Rule 14e-1(c) Claim

Plaintiff bases his fifth claim on SEC Rule 14e-1(c) which makes it unlawful for a tender offeror to "[f]ail to pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer." 17 C.F.R. § 240.14e-1(c)(1979). Defendants were deemed to have accepted tendered shares shortly after 12:01 A.M. on Thursday, January 7, 1982 (when notice was given to defendant Depository Bankers Trust), and defendants commenced payment for accepted shares on Monday, January 11, 1982. As a consequence of that delay, plaintiff claims that tendering Marathon shareholders were wrongfully deprived of the purchase price for tendered shares and the use thereof, whereas defendants were unjustly enriched by an amount estimated at $6,000,000. Second Amended Complaint ¶¶ 64-65.

Defendants move to dismiss the fifth claim on the ground that payment on the third business day following expiration of the tender offer constitutes "prompt payment" as a matter of law.

For "the only insight into how 'prompt' payment is to be measured," defendants direct the Court's attention to a memorandum issued by the SEC's Department of Corporate Finance. Reply Memorandum of Defendants in Support of Motion to Dismiss at 11. The 1970 memorandum discloses that the Commission intended to direct its rulemaking authority against tender offerors who fail to conclude transactions "in accordance with the practices of the financial community, *usually within five days.*" SEC Exchange Act Release No. 16384 [1979-80 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 82,373 at 82,597 n.36

(Nov. 29, 1979) [hereinafter cited as SEC Release] (emphasis added). Defendants also present several self-regulatory rules promulgated by the securities industry which support such a five-day rule.[30] With regard to the allegation that it was practicable for defendants to have made payment on January 7, defendants assert that the magnitude of the transaction and the fact that the amount of each check could not be determined until after midnight of January 6, (the deadline for withdrawal) precluded payment prior to January 11. Memorandum of Defendants in Support of Motion to Dismiss at 40.

Plaintiff argues that Rule 14e-1(c) requires that payment be made or commenced immediately upon purchase. Memorandum of Plaintiff in Opposition to Motion to Dismiss at 63 [hereinafter cited as Plaintiff's Memorandum]. Plaintiff charges that it was practicable for defendants to have made payment on January 7, but that defendants chose not to do so, and submits a *New York Times* article to support this allegation. Plaintiff's Memorandum, *supra*, at 61-62. The plaintiff also presents instances of recent tender offers in which payment commenced the day following expiration of the offer as evidence of the manner in which tender offer transactions are customarily concluded in the securities industry.[31] Plaintiff's Memorandum, *supra*, at 65-66.

---

[30]Defendants make explicit reference to New York Stock Exchange Rules ¶ 2064, American Stock Exchange Rules ¶ 9274, and National Association of Securities Dealers (NASD) Rules of Fair Practice ¶ 2151, Board of Governors Interpretation .04. Memorandum of Defendants in Support of Motion to Dismiss at 40.

[31]Of course, on this 12(b)(6) motion this Court cannot and will not consider facts outside the pleadings.

After consideration of the respective positions advanced by the parties, the Court concludes that defendants' motion to dismiss as to this claim should be denied. Although it appears unlikely that plaintiff will ultimately succeed on his "prompt payment" claim, we do not believe the issue can be resolved as a matter of law. The SEC Release relied on by the parties makes clear that the question of prompt payment is a question of reasonableness, to be determined in light of the facts and circumstances of a particular tender offer transaction and the customary practices of the financial community.[32] Furthermore, there is no merit to defendants' contention that the Release conclusively establishes that a three-day delay is reasonable as a matter of law. The portion of the Release relied on by defendants at best establishes that the practice of the financial community is *usually* to complete payment within five days. The use of the word "usually" clearly leaves room for flexibility in the determination of what constitutes prompt payment. Similarly, the specific examples of rules and practices in the securities industry

---

[32]The Release states in pertinent part:

> Thus, any person making a tender offer is required to use all reasonable efforts to pay promptly for or to return deposited securities. The Commission recognizes that the operation of this standard will be affected by the practices of the financial community and the following factors: current settlement, handling and delivery procedures relating to tenders made by guaranteed deliveries by appropriate institutions; procedures to cure technical defects in tenders; and the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the rules promulgated thereunder. The Commission believes that this provision will protect investors by insuring that deposited securities are not tied up for an unreasonable length of time and will not unduly burden either the offeror or its depository in their operations after the termination of the tender offer.

SEC Release, *supra*, at 82, 596 (footnote omitted).

presented by both parties, while relevant to a determination of reasonableness in this case, are certainly not conclusive.

For the reasons set forth above, the Court finds that plaintiff's Rule 14e-1(c) claim presents factual issues which cannot be resolved on a motion to dismiss. Accordingly, defendants' motion to dismiss this claim is denied.

CONCLUSION

In conclusion, plaintiff's claims under Section 14d(6), § 10(b) and Rules 10(b)13, 14d-6(d), 14d-6(e) and 14e-1(d) (his first, second and third claims for relief) will be dismissed for failure to state a claim. Defendant's motion to dismiss will be denied with respect to plaintiff's claims under § 14(e) and Rule 14e-1(c) (his fourth and fifth claims and relief) and plaintiff's pendent state claims (his sixth and seventh claims for relief).

It Is So Ordered.

Dated: New York, New York
July 2, 1984

/s/ MARY JOHNSON LOWE
United States District Judge

APPENDIX C

Statement Pursuant to Rule 28.1

On July 9, 1986 petitioner United States Steel Corporation changed its name to USX Corporation.

USX Corporation is affiliated with the following entities:

Athlone Prospecting & Development Corporation, Ltd.
First National Bank (Albion, Pa.)
Alfa Produtos Metalurgicos, Ltda.
Companhia Siderurgica Paulista "Cosipa"
Merinds Mineracao
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda.
Mineracao Maraba, Ltda.
Mineracao Xingu, Ltda.
Termerid Mineracao, SA
Torremco Soc. Min. E. Co. Ltda.
Deepsea Ventures, Inc.
Ocean Mining Associates
FHS Stahlverformung GmbH
FHS Automotive Parts Manufacturing Ltd.
Industria de Tubos y Perfiles, S.A. (Intupersa)
Minerales Ordaz C.A.
Les Entreprises du Lac Lucault Inc.
Sidbec-Normines, Inc.
U.S. Steel France
Zeerust Chrome Mines, Limited
Northern Tier Pipeline Co.
USS Technology (Japan), Ltd.
ACE Holdings, Ltd.
Adela Investment Company, S.A.
Altos Hornos de Viscaya, S.A. (AHV)

Associated Ore & Metal Corporation, Ltd.
Avsteel SWA, Ltd.
Blue Grass Phosphate Company
Chrome Deposit Corp. (Court Holdings J.V.)
Kappa Mining & Prospecting Co., Ltd.
LaPointe Iron Company
Compagnie Miniere de L'Ogooue (Comilog)
Feralloys Ltd.
Associated Manganese Mines of South Africa, Ltd.
Navios Shipping Corp.
Oresteel Investments (Proprietary), Ltd.
P. T. Pacific Nikkel Indonesia
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinea Pour
L'Exploitation Des Monts Nimba (Mifergui Nimba)
Tilden Iron Mining Company
West Union Canal Company, The
Bartow Chemical Products
Century III Associates
Fort Meade Chemical Products
Double Eagle Steel Coating Co.
Live Oak Uranium Operations
Rockland Joint Venture
RMI Company
Tenneco/USS Chemicals Joint Venture
USS-POSCO Industries Joint Venture
Prieska Copper Mines (Pty.) Ltd.
Zuari Agro Chemicals Ltd.

Through its wholly-owned subsidiary, Marathon Oil Company, USX is affiliated with the following companies which are partially owned by Marathon Oil Company:

Ecol Beverage Company of Texas
Arctic LNG Transportation Company

Badger Pipe Line Company
City Point Oil Terminal, Inc.
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited
Petroleum Terminals, Inc.
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
West Shore Pipe Line Company
Wolverine Pipe Line Company

Through its wholly-owned subsidiary, Texas Oil & Gas Corp., USX is affiliated with the following companies which are partially owned by Texas Oil & Gas:

Acadian Gas Pipeline System
Alabama Intrastate Supply
Bayou Interstate Pipeline System
Calcasieu Gas Gathering System
Louisiana Industrial Gas Supply System
Neches Pipeline System
Ozark Gas Transmission System

Pelican Interstate Gas System
Pelican Transmission System
Pontchartrain Natural Gas System
Red River Pipeline
Spindletop Gas Distribution System

Supreme Court, U.S.
FILED
OCT 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES STEEL CORPORATION
and USS, INC.,

Petitioners,

—against—

WILLIAM B. PRYOR, on behalf of himself and a Class of other Shareholders of Common Stock of Marathon Oil Company, similarly situated,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DALE A. SCHREIBER
Counsel of Record
SCHWARTZ KLINK & SCHREIBER, P.C.
Attorneys for Respondent William B. Pryor
666 Third Avenue
New York, New York 10017
(212) 687-8550

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE..... 2

REASONS FOR DECLINING THE WRIT.... 6

I. THE COURT OF APPEALS CORRECTLY READ §14(d)(6) TO PROHIBIT THE INCLUSION OF LATE-TENDERED SHARES IN THE PRORATION POOL..... 9

A. By Its Plain Meaning, §14(d)(6) Prohibits The Acceptance Of Late-Tendered Shares....12

B. The Legislative History Shows That Congress Specifically Sought To Prohibit The Acceptance Of Late-Tendered Shares....17

C. The Financial Community And Securities Bar Have Long Assumed The Correctness Of The Court Of Appeals' Reading Of §14(d)(6)....32

Page

D. The Court of Appeals' Reading Of §14(d)(6) Poses No Difficult Problems Of Case Management Or Any Intrusion Into State Contractual Interests...36

II. A PRIVATE DAMAGE REMEDY FOR VIOLATION OF §14(d)(6) WAS PROPERLY IMPLIED BY THE COURT OF APPEALS ON BEHALF OF TIMELY TENDERING SHAREHOLDERS OF THE TARGET COMPANY.....42

A. A Private Damage Remedy Was Properly Found In The Light Of The Language And Structure Of The Substantive Provisions Of The Williams Act And Their Legislative History.....44

B. There Is Overwhelming Evidence That Congress Assumed That Timely Tendering Shareholders Would Have A Private Damage Remedy To Enforce The "Substantive" Provisions Of The Williams Act.....48

Page

C. The Asserted Conflict USS Purports To Find With Two Decisions Of This Court Is Non-Existent.....56

CONCLUSION.....63

TABLE OF AUTHORITIES

CASES	PAGE
Cannon v. University of Chicago, 441 U.S. 677 (1979)	45
Chromalloy American Corp. v. Sun Chemical Corp., 611 F.2d 240 (8th Cir. 1979)	36n
Cort v. Ash, 422 U.S. 66 (1975)	42,42n, 44,58,63
Crane Company v. Westinghouse Air Brake Company, 419 F.2d 787 (2d Cir. 1969)	54
Daily Income Fund v. Fox, 464 U.S. 512 (1984)	49
Dawson Chemical Co. v. Rohm Haas Co., 448 U.S. 176 (1980)	27
Edgar v. MITE Corp., 457 U.S. 624 (1982)	32,39,42
Florida Commercial Banks v. Culverhouse, 772 F.2d 1513 (11th Cir. 1985)	53
GAF Corporation v. Milstein, 453 F.2d 709 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972)	55

CASES PAGE

Indiana National Bank v. Mobil Oil Corp., 578 F.2d 180 (7th Cir. 1970).....16,36n

J.I. Case Co. v. Borak, 377 U.S. 426 (1964).....43,51, 52,55,58

Marathon Oil Company v. Mobil Oil Corp., 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982)..... 4

Merrell Dow Pharmaceuticals Inc. v. Thompson, ___ U.S. ___, 106 S. Ct. 3233 (July 7, 1986)..... 41

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982).....48,50

National Wood Work Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967)..... 27

Osofsky v. Zipf, 645 F.2d 107 (2d Cir. 1981).....36n

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977).....36n,46n

Radol v. Thomas, 772 F.2d 244 (6th Cir. 1985), cert. denied, ___ U.S. ___, 106 S. Ct. 3272 (June 23, 1986).....3,36n

CASES PAGE

Sharon Steel Corporation v. Insurance Commissioner, 458 U.S. 1101 (1982)..... 39

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).....46n

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).....45,56,57

Universities Research Association v. Coutu, 450 U.S. 754 (1980).....56,58,59

STATUTES AND RULES

Securities Exchange Act of 1934

§14(a) (15 U.S.C. §78n(a))..... 51

§14(d)(5) (15 U.S.C. §78n(d)(5))..... 31n,45n,63

§14(d)(6) (15 U.S.C §78n(d)(6))..... 2,4,5, 6,7,8n,9, 10,12,12n,14, 15,16,16n,17, 29,30,32,36,37, 38,40,42,43,44, 45n,50,58,62,63

§14(d)(7) (15 U.S.C. §78n(d)(7))..... 31n, 45n, 63

§27 (15 U.S.C. §78aa)..... 51, 57

Federal Rules of Civil Procedure

Rule 12(b)(6)..... 4-5

CONGRESSIONAL MATERIALS

Full Disclosure of Corporate Equity Ownership And In Corporate Takeover Bids: Hearings on S.510 Before The Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. (1967)..... 18n-19n, 21, 22, 27, 30-31, 47, 48, 54

Full Disclosure of Corporate Equity Ownership and In Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. (1967)..... 19n

Takeover Bids: Hearings on H.R. 14475 and S.510 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) 19n, 23n, 54

Disclosure of Corporate Equity Ownership, H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968).....19n

S.510, 90th Cong., 1st Sess. (1967).....18n,23n, 27,28n

H.R. 14477, 90th Cong., 2nd Sess. (1967)).....23n

113 Cong. Rec. S24665 (August 30, 1967).....28n

113 Cong. Rec. S856 (January 18, 1967)..... 50n

MISCELLANEOUS

H. Blumenthal, 1981 Securities Law Handbook, §20.02 (1981)..... 33

Bromberg, Securities Law: Fraud, S.E.C. Rule 10b-5, (1969)..... 17-18,33

Fogelson, "The Expanding Regulatory Framework Of The Williams Act and Its Effect On Takeover Activities," in Proxy Contests and Battles For Corporate Control, (PLI 1981)..... 33

Greenbaum, "Tips for Takeover Targets' Stockholders," Fortune Magazine, Dec. 28 1981..... 34

The Wall Street Journal, November 30, 1981..... 34

No. 86-386

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNITED STATES STEEL CORPORATION
and USS, INC.,

Petitioners,

-against-

WILLIAM B. PRYOR, on behalf of himself and a Class of other Shareholders of Common Stock of Marathon Oil Company, similarly situated,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent William Pryor submits this brief in opposition to the petition of petitioners United States Steel Corporation and USS,

Inc. (collectively "USS") for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of the Second Circuit's decision entered on June 25, 1986 upholding as legally sufficient respondent's damage claim under Section 14(d)(6) of the Securities Exchange Act of 1934 ("the 1934 Act"), as amended by the Williams Act in 1968 (15 U.S.C. §78n(d)(6)) ("§14(d)(6)").

COUNTERSTATEMENT OF THE CASE

Respondent, a former shareholder of Marathon Oil Company ("Marathon"), alleged in his complaint filed in January 1982 that USS had wrongfully shifted to late-tendering Marathon shareholders $83

million of the approximately $1.5 billion "control premium" paid by USS to Marathon shareholders to acquire 51% of the shares (and therefore effective control) of Marathon, in accordance with the first tier of USS's two-tier tender offer for Marathon. The first tier involved USS's cash offer to purchase 51% or 30 million shares of Marathon stock at $125 per share -- a price premium that at the time "greatly exceeded the average premium in [then] recent control transactions." Radol v. Thomas, 772 F.2d 244, 249 (6th Cir. 1985), cert. denied, ___ U.S. ___, 106 S. Ct. 3272 (June 23, 1986).[1]

---

[1] Mobil Corporation was the contending tender offeror. Its tender offer, whose "premium" exceeded USS's, was prevented by

In the present case, the Court of Appeals held, in an opinion by Judge Winter, that USS violated §14(d)(6) and injured timely-tendering Marathon shareholders by effecting a redistribution of the "control premium" to late-tendering Marathon shareholders through the acceptance into the proration pool of about 3 million Marathon shares tendered by them after the "proration" deadline (Pet. A-9 to A-11). In so holding, the Court of Appeals reversed the ruling of the District Judge (Hon. Mary Johnson Lowe), on USS's motion to dismiss for failure to state a claim for relief under Rule 12(b)(6),

---

a successful antitrust challenge. See Marathon Oil Company v. Mobil Oil Corporation, 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982).

Fed. R. Civ. P., that under §14(d)(6) USS could accept late-tendered shares for any reason whatsoever and that, to redress their injuries, injured tendering shareholders had to rely exclusively on contractual remedies, if any, assertable under state law (Pet. B-12 to B-14).

The Court of Appeals further held that timely tendering Marathon shareholders, on whose behalf respondent sues, had an implied damage remedy to recover the amount of the "control premium" lost as a consequence of USS's acceptance of late-tendered shares (Pet. A-11 to A-14).

In the more than four years that the action has been pending, USS has yet to answer the complaint. USS has also successfully resisted any

discovery and has therefore never yet responded to respondent's interrogatories and related document requests served in February 1982 and directed at determining the identities of the late-tendering shareholders, the circumstances of their late tenders and the reason or reasons why USS included these late-tendered shares in the proration pool.

REASONS FOR DECLINING THE WRIT

USS's petition does not present any legal issue which merits review by this Court. The Court of Appeals' reading of §14(d)(6) to prohibit the acceptance of late-tendered shares strictly accords with the plain language of the statute, and is amply supported by explicit

legislative history, as well as by the common and consistent understanding of the financial and the securities bar regarding the operation of §14(d)(6). The Court of Appeals' implication of a private damage remedy finds persuasive support in §14(d)(6)'s language, structure, and legislative history, as well as this Court's recent dictum regarding the "substantive rights" accorded by §14(d)(6) and cognate "substantive" provisions of the Williams Act designed to protect shareholders tendering pursuant to partial tender offers. There is no evidence of any substantial disagreement with the Court of Appeals' holding or even the existence of other litigated cases involving proration issues, much less

one whose resolution would be assisted by Supreme Court review of this case.[2]

---

[2] The potential $83 million exposure faced by USS in this case is less formidable than it may seem at first blush. The tender offeror's decision to accept late-tendered shares was a voluntary one. Before making that decision, the tender offeror had the opportunity to obtain indemnity agreements from the late-tendering shareholders who received the benefit of the offeror's decision to accept late-tendered shares and therefore could protect itself fully against any resulting §14(d)(6) liability. Even absent indemnity agreements, the tender offeror may still have rights arising under the 1934 Act or common law for indemnity and/or contribution against the benefitting, late-tendering shareholders. Under these assumptions, the net effect of the tender offeror's §14(d)(6) liability is to pledge its creditworthiness in the event that benefitting late-tendering shareholders fail to make restitution of their ill-gotten gain.

I. THE COURT OF APPEALS CORRECTLY READ §14(d)(6) TO PROHIBIT THE INCLUSION OF LATE-TENDERED SHARES IN THE PRORATION POOL.

USS's contentions regarding §14(d)(6)'s prohibition of the inclusion of late-tendered shares in the proration pool established pursuant to an oversubscribed, partial tender offer are transparently insubstantial. The Court of Appeals' reading of §14(d)(6) to prohibit the redistribution of the "control premium" at the whim of USS accords not only with the plain meaning of the statute, but as well with the common understanding of the securities industry and securities bar and legislative history dealing with the precise situation.

In framing its petition, USS misleadingly defines the §14(d)(6) issue. USS asserts that the "question for decision is whether inclusion in the proration pool of shares timely offered, but the tender of which may not have been perfected in accord with the precise terms" of the tender offer violates §14(d)(6) (Pet., pp. 4-5) (Emphasis added). However, the District Court saw the issue presented differently, framing the question as whether "defendant wrongfully accepted late-tendered shares for proration" (Pet. B-9) and the majority of the Court of Appeals read the complaint to assert that USS "included in the proration pool three million shares that were not timely tendered" (Pet. A-3). (Emphasis

added). Neither the District Court nor the Court of Appeals made any factual finding as to why or under what circumstances these shares were late-tendered, accepting, as they were mandated to, the truth of the complaint's factual allegations.[3]

---

[3] USS's factual assertion that the late-tendered shares were "timely offered" is neither alleged by the complaint nor supported in any part of the record. USS's assertion that the District Court so treated the complaint's allegations (Pet., p.5 n.3) is a blatant misrepresentation, for the cited portion of the District Court's decision merely refers to that possibility as one hypothetical explanation for the acceptance of late-tendered shares. In a similar vein, USS also errs in its reliance upon the complaint's reference to USS's December 8, 1981 press release (Pet., p. 4). USS's post-December 8 press releases (Pet., p. 4 n.2) show that the number of tendered Marathon shares decreased by 3 million shares

A. By Its Plain Meaning, §14(d)(6) Prohibits The Acceptance Of Late-Tendered Shares.

Contrary to USS's contention (Pet., p. 11), §14(d)(6) is not "silent" on the question of late-tendered shares.[4] §14(d)(6)'s

---

after December 8, 1981 because previously tendering shareholders had apparently withdrawn these shares in order to deposit them in response to Mobil's competing offer which was at a higher price than USS's (Joint Appendix, A-89). Judge Lumbard's dissent, to the extent that it adopted USS's factual contentions, simply misses the mark. The determination of the precise circumstances involved in USS's acceptance of late-tendered shares must await discovery and trial.

4 §14(d)(6) provides as follows:

> Where any person makes a tender offer, or request or invitation for ten-

definition of "pro rata" does not permit the tender offeror, as USS contends, to determine the proration

---

> ders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.
>
> (Emphasis added.)

ratio. This definition necessarily excludes late-tendered shares.

The starting point in the analysis is §14(d)(6)'s direction compelling a tender offeror making a partial tender offer to "take up", i.e., purchase, shares on a "pro rata" basis. The relevant phrase of §14(d)(6)'s first sentence directs that "the securities taken up" "shall be taken up as nearly as may be pro rata, disregarding fractions . . .."

The last phrase of §14(d)(6)'s first sentence requires "proration":

> according to the number of shares deposited by each depositor. (Emphasis added.)

The "depositor" and "shares" included in this formula are only those "shares" tendered by those "deposi-

tors" who deposit, in aggregate, "a greater number of securities * * * pursuant thereto [to the tender offer, request or invitation] within ten days after copies of the offer or request or invitation are first published or sent or given to holders than such person [the tender offeror] is bound or willing to take up or pay for." (Emphasis added.)

To justify USS's reading of §14(d)(6), the "proration" ratio would have to be calculated "according not only to the number of shares deposited by each depositor but those of later depositing depositors whose shares are accepted for purchase." (Emphasis denotes amendment required to support USS's reading). However, the only additional shares permitted

by §14(d)(6) to be included in the proration pool are those "deposited", in the words of its second sentence, "within ten days after notice of an increase in consideration offered to security holders . . . is first published or sent or given to security holders." That did not happen here.[5]

---

[5] Contrary to USS's contention (Pet., p. 11), Indiana National Bank v. Mobil Oil Corp., 578 F.2d 180 (7th Cir. 1970) merely held that the tender offeror could properly reject late-tendered shares in an oversubscribed partial offer. Indeed, the District Court opinion in that case, which was affirmed, appears to suggest that, since only those shares tendered within the 10-day proration period could be accepted for proration under §14(d)(6), the tender offeror had no choice but to reject the late-tendered shares (457 F. Supp. at 1031-32).

B. The Legislative History Shows That Congress Specifically Sought To Prohibit The Acceptance Of Late-Tendered Shares.

Section 14(d)(6)'s legislative history is best understood in the light of one simple and indisputable fact about partial tender offers: the tender offeror's legitimate needs are fully satisfied once it receives tenders of the number of shares that its tender offer provides that it will purchase. Therefore, in a partial tender offer, the tender offeror has no need to accept late-tendered shares where, as here, the offer is vastly oversubscribed during its first ten days.

The legislative history of §14(d)(6) is well summarized in Bromberg, Securities Law: Fraud, SEC

Rule 10b-5, §6.3 (531) (1969):

> The SEC recommended to Congress that acceptance be pro rata over the whole duration of the offer. * * * * All the security industry representatives disagreed with the SEC. * * * The N.Y.S.E. had long regarded offers without a pro-ration period as "objectionable" and had urged (but not required) its listed companies to take pro-rata from deposits during the first ten-days. * * * This was the pattern Congress made mandatory, with some sharpening of details.[6]

---

[6] Hearings were first held in the Senate on the original bill, S.510, 90th Cong., 1st Sess. (1967). The original pro rata provision, Sec. 2(5) of S.510, would have required pro rata purchase of all shares tendered throughout the tender offer. Full Disclosure of Corporate Equity Ownership And In Corporate Takeover Bids: Hearings on S.510 Before the Subcommittee On Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. (1967)

The subject of late-tendered shares arose in a crucial battle

---

("Senate Hearings On S.510"). The bill, with material changes in the proration provision discussed hereinafter, was reported favorably by that committee. Senate Committee on Banking and Currency, Full Disclosure of Corporate Equity Ownership and In Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. (1967) ("S.Rep. No. 550").

Hearings were held by the House on an amended version of S.510, during which Sec. 2(5) was amended to provide for a limited 10-day proration period and for extension of proration period in the event the offer price was increased. Takeover Bids: Hearings on H.R. 14475 and S.510 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) ("House Hearings on H.R. 14475 And S.510"). The House Committee recommended that S.510 (as amended) be adopted. House Committee On Interstate And Foreign Commerce, Disclosure of Corporate Equity Ownership, H.R. Rep. No. 1711, 90th Cong., 2d Session (1968) ("H.R. Rep. No. 1711 On S.510").

between the Securities and Exchange Commission ("SEC"), then ably represented by its Chairman Manuel F. Cohen, and the securities industry during hearings before the Senate Subcommittee on Securities of the Senate Committee on Banking and Currency.

During these hearings, in the face of the industry's unanimous opposition to the SEC's desire to control the proration period by rule-making, Chairman Cohen moderated the SEC's position, declaring to the Subcommittee his view that the "basic suggestion [of the New York Stock Exchange ("NYSE") and the Investment Bankers Association ("IBA") calling for a fixed, statutory 10-day proration period] has considerable merit"

(Senate Hearings On S.510, p. 187). He then pointedly hypothesized the very situation posed in this case -- of possible acceptance of late-tendered shares to the detriment of timely tendering shareholders:

> MR. COHEN. But before I deal with that, I would like to refer to what the IBA said on this point this morning. They say, "This requirement" -- that is, the pro rata requirement -- "might deter certain holders from accepting the tender offer because those holding large blocks are often unwilling to have their holdings split into fractions and will sell only on an all-or-nothing basis. We suggest therefore that the period be limited to 10 days."
>
> That is, for the little shareholder it is pro rata, but the big fellow, who knows the score, waits for the 11th day, and has all his shares taken.
>
> The basic equity of that suggestion is something

> this committee will have to consider.
>
> * * * *
>
> Third, he [the tender offeror] may receive a sufficient number of shares during the initial period to encourage him to proceed and to sell more. We would have no objection to permitting him to provide that shares tendered during a subsequent period will be taken up on a first-come-first-served basis, provided that before doing so he takes up all of the shares tendered during the initial period or at least become obligated to do so, since by hypothesis the shares he received initially are fewer than the number the offeror really wants.
>
> I think this would deal with the problem that I discussed and that I believe exists in the suggestion made by the IBA and by the exchanges.

(Senate Hearings On S.510, p. 187; emphasis added).

In short, although the SEC continued to ask without ultimate

success for rule-making authority to establish the proration period,[7] Chairman Cohen emphasized that the SEC would accept the basic securities industry position on ten-day proration if there were assurance that the

---

[7] To complete the saga of the SEC's bid for rule-making power to determine the length of the proration period, we note that Chairman Cohen's considerable influence on the Hill enabled him, in the House version of the bill (H.R. 14477), to restore the original version of S.510's proration provision, but with an amendment granting the SEC power to change the proration period. House Hearings On H.R. 14475 and S.510, p. 4. In those subcommittee hearings, the differences between the SEC and the securities industries were again highlighted by the testimony of Donald Calvin of the NYSE and Mr. Cohen before the House Subcommittee. Id. at p. 49-52. The industry view, as expressed earlier by Mr. Calvin to Senator Williams' Subcommittee, prevailed and the House adopted the Senate's amended version of S.510, rather than H.R. 14475.

timely tendering shareholders -- including "the little shareholder" -- were protected against dilution resulting from acceptance of late-tendered shares.

Speaking for the securities industry, the IBA gave the assurance requested by Chairman Cohen in its letter of April 19, 1967 to Senator Williams and the Subcommittee on Securities, in these terms:

> 2. Pro-Rata requirement limited to 10-days. The IBA and several other industry organizations recommended that subsection 5 of Section 2 be changed so that the prorationing requirement on tender offers apply only for 10 days. The chairman of the SEC referring to the IBA recommendation on this point, stated that its effect would be:
>
> "That is for the little shareholder it is pro rata, but for the big fellow, who

knows the score, he waits for the eleventh day, puts it all in, and has all the shares taken."

That would not be the effect of our proposal. We recommend that (a) where more securities are tendered during the first 10 days than the person making the tender offer proposed to take up, all of the securities taken up shall be taken pro rata from those tendered during the first 10 days unless the tender offer is increased to take a larger number of shares, in which case, remaining shares tendered during the first 10 days would have to be taken up before any shares subsequently tendered were taken; but (b) if the amount of securities tendered during the first 10 days does not exceed the amount which the person making the tender offer is willing to take up, all of the shares tendered to that date and thereafter may be taken up on a first-come-first-served basis

without prorationing. (Emphasis added.)

* * *

(i) If at the end of 10 days 150,000 shares have been tendered and an additional 50,000 shares are tendered during the following five days, under our proposal the person making the tender offer would accept 100,000 shares on a pro-rationed basis from the 150,000 shares which were tendered during the first 10 days. He would not be permitted to accept any of the 50,000 shares tendered during the following five days unless the tender offer was increased to take a larger number of shares, in which case he would be required to take up all of the shares tendered during the first 10 days before taking any of the shares tendered during the following five days.

* * * *

We hope that these additional comments will help clarify and resolve the issues for your Committee.

Senate (Hearings On S.510, pp. 245-46; emphasis added).

When Congress legislates against a background of such detailed consideration of the operation of a proposed, highly technical statute, this Court has felt bound by this persuasive evidence of Congressional intent. See, e.g., Dawson Chemical Co. v. Rohm and Haas Co., 448 U.S. 176, 204 (1980); National Wood Work Manufacturers Association v. N.L.R.B., 386 U.S. 612, 646 (1967). In the case of the Williams Act, the strength of this legislative history is amplified by virtue of the fact that the full Senate passed the Williams Act on the basis of the adjustments made to S.510 as a result of

the SEC/securities industry debate in the subcommittee hearings.[8]

---

[8] The full Senate, in passing the bill S.510 on to the House of Representatives, was informed (in response to questions addressed by Senator Javits to its co-sponsors, Senators Williams and Kuchel) that the SEC and the securities industry were in agreement on the bill in the following colloquy (113 Cong. Rec. S24665, 90th Cong. 1st Sess. (August 30, 1967)):

> MR. JAVITS. I gather that it has the approval of the Securities and Exchange Commissions?
>
> MR. WILLIAMS of New Jersey. It had the across-the-board approval of the securities industry and, as the Senator from California has stated, the approval of the Securities and Exchange Commission as well as that of the stock exchanges.
>
> MR. JAVITS. It did receive the approval of the stock exchange? That is very important. Did that approval include the New York Stock Exchange and the

Neither in its petition to this Court nor in the Court of Appeals did USS dispute that this legislative history revealed a clear purpose to prohibit the acceptance of late-tendered shares on an oversubscribed, ten-day partial offer. USS's continuing emphasis on only that portion of §14(d)(6)'s legisla-

---

American Stock Exchange?

MR. WILLIAMS of New Jersey. Yes, that is correct.

MR. KUCHEL. And the Pacific Coast Stock Exchange?

MR. JAVITS. The Pacific Coast Stock Exchanges, and other stock exchange?

MR. KUCHEL. That is correct.

MR. JAVITS. The bill, I gather, now goes to the House Of Representatives; is that correct?

MR. KUCHEL. That is right.

tive history which reflects Congress' intent to outlaw the "first come, first serve" partial tender offer is simply misdirected.

The legislative history forcefully documented, as the Court of Appeals correctly pointed out, the "nondiscrimination component" of the proration requirement (Pet. A-9). For example, Chairman Cohen explained that one of the objectives of the Williams Act was "to assure fair treatment of all shareholders who decide to accept a tender offer" by imposing "three substantive provisions designed to assure that all stockholders who tender their shares are treated fairly."[9] Senate

---

[9] In addition to §14(d)(6), these provisions include Sec-

Hearings On S.510, p. 21. The SEC, during the Senate Subcommittee hearings, likewise noted that the proration requirement and cognate substantive safeguards of the Williams Act, were designed "to eliminate practices in connection with tender offers which may result in unfair discrimination among persons tendering their shares * * *." Senate Hearings on S. 510, p. 203 (emphasis added). Indeed, this Court recognized the "non-discrimination component" of

---

tions 14(d)(5) and 14(d)(7) of the 1934 Act (15 U.S.C. §§78(d)(5), (7)). These latter provisions require that tendering shareholders be allowed a minimum period of time to withdraw their timely tendered shares and that early tendering shareholders be granted all increases in the tender offer price.

§14(d)(6) when it noted that the Williams Act's substantive provisions were designed to assure that target company shareholders would not be unfairly deprived of "the opportunity to sell shares for a premium over their market price." Edgar v. MITE Corp., 457 U.S. 624, 634 n.9 (1982) (emphasis added).

C. The Financial Community And Securities Bar Have Long Assumed The Correctness Of The Court Of Appeals' Reading Of §14(d)(6).

The securities bar's understanding that §14(d)(6) prevented the tender offeror's acceptance of late-tendered shares is typified by the following from Professor Bromberg's securities law text:

> Example 1: (Initial tenders exceed minimum; mini-

> mum taken up) The offer is for 800 shares and 1,000 are deposited (tendered) in the first ten days, and 100 later. If the offeror takes up only 800, it must take pro rata (80 percent) from each of the initial tenders, subject to rounding of fractions. Nothing will be taken from the later tenders. (Emphasis added.)

Bromberg, Securities Law: Fraud, S.E.C. Rule 10b-5, §6.3 (533) (1969)

Other securities law texts addressing the issue come to the same conclusion. See, e.g., H. Blumenthal, 1981 Securities Law Handbook, §20.02 at 215 (1981); Fogelson, "The Expanding Regulatory Framework of the Williams Act And Its Effect On Takeover Activities", in Proxy Contests and Battles for Corporate Control, §2.2.2.2 at 25-26 (PLI 1981).

When the importance of timely

tendering of shares arose during the USS/Mobil contest for Marathon, the financial press reported the similar understanding of the financial community that the tender offeror could not accept late-tendered shares. In a November 30, 1981 article describing this contest, The Wall Street Journal noted:

> The proration deadline of a partial tender offer establishes a preferential "pool" of stock to be purchased first under terms of the offer. If more than the target number of shares is tendered, then the offer would be satisfied entirely from this preferential pool, with purchases on a pro rata basis.

A similar contemporaneous explanation, found in M. Greenbaum, "Tips for Takeover Targets' Stockholders", Fortune Magazine, Dec. 28,

1981 at pp. 110-112, noted:

> Investors wanting cash must move swiftly. Although SEC rules specify that any tender offer must last at least 20 business days, shareholders may have only ten calendar days to get into the "proration pool." Being in the pool ensures target shareholders of getting cash for at least a portion of their stock. Frequently the cash part of the offer is oversubscribed: more shares are tendered for cash than the acquiring company sought. When that happens, the acquirer buys only part of the shares, treating stockholders in the pool equally. * * * * those who weren't in the pool will eventually have to take stock if they don't sell their shares in the market.

D. The Court Of Appeals' Reading Of §14(d)(6) Poses No Difficult Problems Of Case Management Or Any Intrusion Into State Contractual Interests.

USS's remaining argument (Pet., Point II-B at pp. 16-18) ignores the fact that litigation over major tender offers is already predominantly brought in the federal courts -- in part precisely because Congress has enacted comprehensive requirements and safeguards for tender offers (and for securities transactions generally).[10] The federal

---

10 A few examples, out of many available from different circuits, include Piper v. Chris-Craft Industries, Inc., supra; Radol v. Thomas, supra; Osofsky v. Zipf, 645 F.2d 107, 113 (2d Cir. 1981); Chromalloy American Corp. v. Sun Chemical Corp., 611 F.2d 240, 249 n.19 (8th Cir. 1979); and Indiana National Bank v. Mobil Oil Corp., supra.

courts have determined factual questions in those cases, and decided such incidental questions of state law as are necessary, without perceptible difficulty. Such tender offer litigation appears to pose no unusual case management problems.

In any event, USS's reading of §14(d)(6) --which would permit a tender offeror to admit late-tendered shares into the proration pool -- presents the very same types of case management considerations that are presented by the Court of Appeals' reading of that provision.

Even if USS's reading of §14(d)(6) were correct, federal courts would obviously still be involved in cases dealing with the mechanics of tender offers regulated

by the Williams Act. In any case where the tendering plaintiff shareholder alleges a claim based on a failure of the tender offeror to "take up" shares "pro rata", the court would still have to consider, in the District Court's very own words, "what constitutes [a] valid tender under the terms of the offer, and whether all of the shares were validly tendered by the proration deadline." (Pet. B-13) Making such determinations is an inevitable consequence of according any private damage remedy under §14(d)(6), whether one accepts the Court of Appeals' or USS's reading of §14(d)(6)'s proration formula. There is nothing intrinsically unmanageable about such a fact-finding exercise.

USS's contentions about state law contract issues try to stand the proper federal priority on its head. This Court has, in a variety of contexts, held that, in the area of tender offers for public companies, the Williams Act imposes uniform national standards that preempt conflicting state law. See Edgar v. MITE Corp., 457 U.S. at 644; Sharon Steel Corporation v. Insurance Commissioner, 458 U.S. 1101 (1982). Here, Congress' documented purpose to prevent dilution of the proration pool through the acceptance of late-tendered shares is clear. As the Court of Appeals held, this federal priority takes precedence over imagined conflicts with suppositious state interests argued by USS (Pet. A-11, A-14).

Moreover, both federal interests and state interests, if any, are best served by litigating proration issues arising under §14(d)(6) in federal court. The alternative is at least two, or even multiple, separate class actions involving the same tender offer -- one in a federal court, and one or more additional suits in the state courts, with the concomitant proliferation of paper, trial time, effort and expense and risk of inconsistent or conflicting results. This would obviously tend to defeat Congress' intention to enact a comprehensive, uniform federal law for the protection of tendering shareholders of target companies involved in nationwide tender offers.

Indeed, insofar as respondent's claim is said to rest strictly

on state contract law, so pervasive is the federal interest here that this is probably one of those cases where federal "arising under" jurisdiction is appropriately invoked. See Merrell Dow Pharmaceuticals Inc. v. Thompson, ___ U.S. ___, 106 S. Ct. 3233, esp. 3236 n.12 (July 7, 1986).

In the end, however, the federal/state problem imagined by USS has not concretely arisen in this case. After four years of doing battle over the Williams Act issues, USS has yet to answer the complaint or respond to discovery aimed at determining under what circumstances late-tendered shares were accepted. USS's attempt to obtain Supreme Court review is merely a litigation tactic to impede this factual inquiry.

II. A PRIVATE DAMAGE REMEDY FOR VIOLATION OF §14(d)(6) WAS PROPERLY IMPLIED BY THE COURT OF APPEALS ON BEHALF OF TIMELY TENDERING SHAREHOLDERS OF THE TARGET COMPANY.

The Court of Appeals had little difficulty in finding a private damage remedy for violation of §14(d)(6)'s proration requirement. While the Court of Appeals made the standard four-prong Cort v. Ash[11] analysis, its conclusion might have rested as well on the following dictum in this Court's recent decision in Edgar v. MITE Corp., 457 U.S. at 644:

> The Illinois [anti-takeover] Act seeks to protect shareholders of a company subject to a tender offer by * * * according shareholders withdrawal, proration and equal consideration rights. However, the

[11] 422 U.S. 66 (1975).

> Williams Act provides these same substantive protections. . . . .. (Emphasis added.)

Thus, contrary to USS's semantic quibble (Pet., p. 9 n.5), this Court has noted that the "substantive protections" of §14(d)(6) are accorded in the form of substantive "rights" and the Court of Appeals correctly so concluded.

It is true that no specific provision was made in the Williams Act to enlarge the express private damage remedies available under the 1934 Act. The absence of such express provision in the Williams Act -- enacted in 1968 shortly after this Court's highwater mark on implied remedies in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), and many years before retrenchment began in 1975

with Cort v. Ash -- hardly precludes implication of a private damage remedy in this case.

A. A Private Damage Remedy Was Properly Found In The Light Of The Language And Structure Of The Substantive Provisions Of The Williams Act And Their Legislative History.

Section 14(d)(6), in its straightforward text, identifies the protected plaintiff, i.e., "each depositor" of "securities" of which tender is made within the 10-day proration period. This plaintiff-identifying language, together with similar structure of the two other "substantive" provisions of the Williams Act, reflects an intent appearing "implicitly in [its] language [and] structure" to establish a dam-

age remedy. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S 11, 18 (1979).[12]

Indeed, in Cannon v. University of Chicago, 441 U.S 677, 690 n. 13 (1979), this Court noted that language clearly identifying a narrow plaintiff class would almost inevitably imply congressional intent to create a private remedy:[13]

---

12 Sections 14(d)(5) and (d)(7) of the 1934 Act specifically identify the protected plaintiffs in the same fashion. Section 14(d)(5) identifies the "depositor" of securities as the person entitled to the withdrawal rights granted thereby, whereas Section 14(d)(7) identifies "each security holder whose securities are taken up," under the circumstances therein defined, as the person entitled to an increased price per share.

13 In this respect, §14(d)(6) is unlike other provisions of the 1934 Act or other securities laws whose violation has been

> . . . this Court has never refused to imply a cause of action where the language of the statute explicity conferred a right directly on a class of persons that included the plaintiff in the case.

The right-conferring nature of these "substantive" provisions is substantiated by the Williams Act's legislative history. In his crucial testimony already quoted, Chairman Cohen was explicit about the Senate bill's purpose to accord substantive rights to tendering shareholders:

> The bill in its present form contains three substantive provisions designed to assure that all stockholders who tender their shares are treated fairly.

---

held not to create the private damage remedy sought. See, e.g., Piper v. Chris-Craft Industries, Inc. 430 U.S. 1 (1977); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

Senate Hearings on S.510, p. 21 (emphasis added).

Professor Hayes, who played a highly influential role in the Senate Subcommittee hearings, strongly endorsed the notion that tendering stockholders were to be accorded enforceable rights, in this colloquy with Senator Williams:

> MR. HAYES: * * * The two major protagonists -- the bidder and the defending management -- do not need any additional protection, in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their interests. Rather, the investor -- who is the subject of these entreaties of both major protagonists -- is the one who needs a more effective champion, and this is an important point.

Senate Hearings On S.510, p. 57 (emphasis added). Relating the need to champion the investor to the "sub-

stantive" provisions of S.510, he further stated:

> In conclusion, Professor Taussig and I fully support the intent of the Congress to give necessary and meaningful protection to the investor involved in a tender offer takeover bid.

Senate Hearings on S.510, p. 60 (emphasis added).

B. There Is Overwhelming Evidence That Congress Assumed That Timely Tendering Shareholders Would Have A Private Damage Remedy To Enforce The "Substantive" Provisions Of The Williams Act.

In Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), this Court considered the appropriateness of implied damage remedies by undertaking a sensitive and wide-ranging analysis of congressional action in "its contemporary

legal context", paying particular heed to Congress' understanding of contemporary "judicial decisions" finding implied remedies in similar circumstances (456 U.S. at 379).

The Court subsequently elaborated upon this methodology in a more recent decision concerning implied remedies in the securities field. In Daily Income Fund v. Fox, 464 U.S. 512, 104 S. Ct. 831, 838-840 (1984), Justice Brennan, speaking for a virtually unanimous court, described the search for "legislative intent" as involving a highly open-ended inquiry (104 S. Ct. at 839):

> That intent may in turn be discerned by examining a number of factors, including the legislative history and purpose of the statute, the identity of the class for whose particular benefit the statute was passed,

> the existence of express statutory remedies adequate to serve the legislative purpose and the traditional role of the states in affording the relief claimed.

Under the Merrill Lynch/Daily Income Fund analysis, the implication of a private damage remedy for tendering shareholders injured by deprivation of their proration rights under §14(d)(6) easily passes muster.

During the period 1965-1968, when the Williams Act was under legislative consideration,[14] this

---

[14] Congress' work on the Williams Act began with an initial bill first submitted as S.2732 to the Senate in 1965 where it was not the subject of any hearings. See Comments of Senator Williams, 113 Cong. Rec. at S856 (January 18, 1967). In amended form, it was re-submitted in 1967 to the Senate by Senators Williams and Kuchel and was the subject of extensive hearings in 1967 and 1968 in Senate and

Court's 1964 decision in J.I. Case Co. v. Borak was the prevailing federal judicial authority on implied damage remedies under Section 14(a) of the 1934 Act, 15 U.S.C. §78n(a) (377 U.S. 430-33). Justice Clark, for a unanimous Court, wrote expansively of the federal courts' broad powers "'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded" (377 U.S. at 433). Most critically here, the Court unequivocally posited an implied damage remedy merely on the provisions of Section 27 of the 1934 Act (15 U.S.C. §78aa), which granted "exclusive jurisdiction" to federal district

---

House Committees, as described above. In July, 1968, passage finally occurred.

courts over "all suits in equity and actions at law brought to enforce any liability or duty created by" the 1934 Act (377 U.S. at 433-34) (emphasis added).

The Eleventh Circuit recently noted, in upholding an implied right of action under the Williams Act for the target company, that Borak provided the "contemporary legal context" for implied remedies surrounding enactment of the Williams Act:

> Only four years before the passage of the Williams Act in 1968, the Supreme Court held that Section 14(a) of the Exchange Act permitted a shareholder to sue for damages on behalf of the corporation to redress injuries from false and misleading proxy solicitation materials distributed in violation of that provision. J.I. Case Co. v. Borak, 377 U.S. 426, 84 S. Ct. 1555, 12 L.Ed 2d 423 (1964). It could be

> argued that, given the Williams Act's origin in Section 14(a), Congress had ample reason to assume that the federal judiciary would imply certain private rights of action to enforce the newly enacted mandates. However, since Borak held that a stockholder had a private right of action, the fact that Congress might have intended to preserve this particular private remedy does not necessarily imply that Congress intended to preserve or create a remedy for the issuer corporation.

Florida Commercial Banks v. Culverhouse, 772 F.2d 1513, 1518 (11th Cir. 1985) (emphasis added).

Also noting this same "legal context" in his appearance before the Senate Subcommittee on Securities, Professor Carlos Israels confidently predicted as follows:

> Presumably we may assume that the Commission will be able to enforce the provisions of this Bill,

> if it is enacted, and of its rules thereunder by proceedings for injunction in the Federal courts; and that under J.I. Case Co. v. Borak, 77 U.S. 426 (1964) a private litigant could seek similar relief before or after the significant fact such as the acceptance of his tender of securities.

Senate Hearings on S.510, p. 67.

The legislative history also shows that Congress was specifically aware, during the House hearings, of the then ongoing major tender offer litigation which is described in Crane Company v. Westinghouse Air Brake Company, 419 F.2d 787 (2d Cir. 1969). This awareness is reflected in several articles brought to the attention of Chairman Cohen by Representative Moss (House Hearings on H.R. 14475 and S.510, pp. 22-23). In its opinion in Crane, the Second

Circuit applied J.I. Case Co. v. Borak to the question of remedies, holding that the plaintiff's "remedies may include damages, if any, prospective injunctive relief as well as appropriate retrospective relief . . ." (419 F.2d at 803). This holding clearly reflects the same understanding Congress must be credited with when it passed the Williams Act in 1968. As Judge Kaufman wrote soon thereafter: "The teachings of J.I. Case Co. v. Borak . . . are part of the ABC's of securities law." GAF Corporation v. Milstein, 453 F.2d 709, 719 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972).

C. The Asserted Conflict USS Purports To Find With Two Decisions Of This Court Is Non-Existent.

Running a retread of its argument before the Court of Appeals, USS argues that the Court of Appeals' approach to implied remedies "would have necessitated a different result" in Transamerica and Universities Research Association v. Coutu, 450 U.S. 754 (1980) (Pet., p. 10). These two cases -- which are the only implication cases on which USS now relies -- are easily distinguished.

Transamerica, contrary to USS's contention (Pet., p. 10), provides the analytical approach applied by the Court of Appeals. There, this Court noted that the "absence of anything in the legislative history that

indicates an intention to confer any private right of action . . . does not automatically undermine . . ." the existence of a private remedy and that such a remedy may be implied where, as here, such an intent to confer one "appear[s] implicitly in the language or structure of the statute, or in the circumstances of its enactment." (444 U.S. at 18; emphasis added).

In Transamerica, this Court implied a private injunctive remedy, but declined to imply a private damage remedy under the Investment Company Act. A key factor in its analysis, however, was the omission from the jurisdictional provisions of that Act of the remedy-creating language contained in Section 27 of the 1934

Act (quoted above) which this Court in J.I. Case Co. v. Borak found to create implied damage remedies (444 U.S. at 21-22). In finding that an injunctive remedy granted "the customary legal incidents of voidness, including the availability of a suit for rescission *** and for restitution," the Court found an effective means of enforcing the statutory safeguards. Here, by contrast, USS has not suggested any remedy for meaningful enforcement of §14(d)(6).

Coutu is even more inapposite to the present case. The plaintiff there failed nearly all of the Cort tests. This Court found an affirmative congressional intent to deny the private damage remedy proposed by plaintiff for implication because

that remedy would have conflicted with the elaborate administrative remedies provided by the statute. (450 U.S. at 770-73, 783-84).

In Coutu, plaintiffs sought to imply a private damage remedy under the Davis-Bacon Act, which provides minimum wage protection to employees of certain federal contractors, when the federal contract had not been determined, by the Davis-Bacon Act's mandated administrative procedure, to "call for Davis-Bacon work" (450 U.S. 756). The statutory scheme in question provided a three-step procedure to give rise to a private damage claim: (1) the contract had to have been determined by the Secretary of Labor to involve "Davis-Bacon work", (2) the contracting

agency was first to pay to the contractor's employees out of amounts due to the contractor any underpayment of wages, and (3) only when the administrative remedy failed to compensate the employee fully was the employee accorded a private damage remedy enforceable in a court proceeding (450 U.S. at 771-73). Under Davis-Bacon, Congress had established the detailed, three-phase procedure to permit federal contractors to be able to determine their project costs in advance of bidding (450 U.S. at 776). On the basis of the act's structure and legislative history, a unanimous Court found that to permit private litigants to circumvent the need for a prior administrative determination that Davis-Bacon wage floors were applicable would "defeat"

two important and articulated Congressional objectives (450 U.S. at 777) and, in the circumstances there presented, "would introduce substantial uncertainty into government contracting," causing "federal budgeting to be disrupted" (450 U.S. at 782-83).[15] This is a far cry from the situation here where no inconsistent remedies were set up and no operations of government are affected.

Finally, USS's broad-brush assertions that the Court of Appeals decision somehow will cause private damage remedies to be inferred in vast areas of law "such as wage stan-

---

[15] The Court in Coutu also found that subsequent attempts to amend Davis-Bacon on the point in issue had been rejected by Congress (450 U.S. at 777-79).

dards, OSHA regulations, discrimination cases, food and drug cases, or environmental situations" is merely a ploy (Pet., p. 11). In the District Court and the Court of Appeals, USS argued that several cases in those areas of the law compelled the denial of a private damage remedy under §14(d)(6). These cases, however, were easily distinguished in our briefs in those courts. USS, now relying specifically only on two of the over twenty cases relied upon below, attempts to resurrect its reliance on these cases without citing them. This tactic merely illustrates the untenability of its position that the Court of Appeals made anything other than a traditional and proper application of the Cort v. Ash factors.

In short, USS's position on implied remedies for violations of §14(d)(6) would effectively relegate this statute and the cognate provisions of §§14(d)(5) and (7) -- providing withdrawal and equal consideration rights -- to "dead letter" status, rendering them enforceable only in after-the-fact cases by an SEC-sponsored injunction forbidding the tender offeror, which may never again be engaged in another tender offer, from violating the statute again. This Court's teaching on implied remedies was not intended to lead to such an absurd result.

CONCLUSION

USS's petition does not present any issue of public importance

meriting review by this Court. There is no conflicting authority or pending litigation, to our knowledge, that would be resolved by this Court's review of either of the Court of Appeals' two holdings. This case should be permitted, after four years of dilatory tactics by USS, to proceed to discovery and trial. The petition should be denied.

Dated: October 6, 1986

Respectfully submitted,

Dale A. Schreiber
Lawrence C. Browne

SCHWARTZ KLINK &
SCHREIBER, P.C.
Counsel for Respondent
William B. Pryor
666 Third Avenue
New York, New York 10017
(212) 687-8550